4337-15

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 293

[2231A2100DD/AAKC001030/A0A501010.999900]

RIN 1076-AF68

Class III Tribal State Gaming Compacts

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Indian Affairs (BIA) seeks input on changes to its regulations governing the review and approval of Tribal-State gaming compacts. The revisions would add factors and clarify how the Department reviews "Class III Tribal-State Gaming Compacts" (Tribal-State gaming compacts or compacts).

DATES: Interested persons are invited to submit comments on or before March 1, 2023.

ADDRESSES: You may submit comments by any one of the following methods.

- *Federal eRulemaking Portal*: Please upload comments to http://www.regulations.gov by using the "search" field to find the rulemaking and then following the instructions for submitting comments.
- *Email*: Please send comments to consultation@bia.gov and include "RIN 1076-AF68, 25 CFR Part 293" in the subject line of your email.
- *Mail*: Please mail comments to Indian Affairs, RACA, 1001 Indian School Road NW, Suite 229, Albuquerque, NM 87104.

FOR FURTHER INFORMATION CONTACT: Oliver Whaley, Director, Office of Regulatory Affairs and Collaborative Action (RACA), Office of the Assistant Secretary – Indian Affairs; Department of the Interior, telephone (202) 738-6065, RACA@bia.gov.

SUPPLEMENTARY INFORMATION: This proposed rule is published in exercise of

authority delegated by the Secretary of the Interior to the Assistant Secretary – Indian Affairs (Assistant Secretary; AS—IA) by 209 DM 8.

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I. STATUTORY AUTHORITY

In enacting IGRA, Congress delegated authority to the Secretary to review compacts to ensure that they comply with IGRA, other provisions of Federal law that do not relate to jurisdiction over gaming on Indian lands, and the trust obligations of the United States. 25 U.S.C. 2710(d)(8)(B)(i)-(iii).

II. EXECUTIVE SUMMARY

The Department of the Interior (Department) is considering revisions to its regulations governing the review and approval of Tribal-State gaming compacts (25 CFR part 293). The revisions would add factors and clarify how the Department reviews "Class III Tribal-State Gaming Compacts" (Tribal-State gaming compacts or compacts).

The Department's current regulations do not identify the factors the Department considers; rather, those factors are contained in a series of decision letters issued by the Department dating back to 1988. Evolution in the gaming industry and ongoing litigation highlight the need for the Department to clarify how it will analyze Tribal-State gaming compacts to determine whether they comply with the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. 2701, *et. seq.*, other provisions of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians.

III. BACKGROUND

In 1988 the Indian Gaming Regulatory Act acknowledged that many Tribes were already engaged in gaming, and placed limits on Tribes' sovereign right to conduct gaming. It sought to ensure that Indian Tribes are the primary beneficiaries of the gaming operation, but also authorized State governments to play a limited role in the regulation of class III Indian gaming by negotiating agreements with Tribes called "Class III Tribal-State Gaming Compacts" (class III gaming compacts or compacts). Congress sought to strike a balance between Tribal

sovereignty and States' interests in regulating gaming and "shield it from organized crime and other corrupting influences." 25 U.S.C. 2702(2).

At the time of IGRA's enactment, Indian gaming represented an approximately $121 million segment of the total United States gaming industry, while Nevada casinos reported approximately $4.1 billion in gross gaming revenue.[1] By the end of fiscal year 2021, Indian gaming represented an approximately $39 billion segment of the total United States gaming industry, with commercial gaming reporting $53 billion.[2] In the Casino City's Indian Gaming Industry Report 2018 Edition, Allen Meister, Ph.D. of Meister Economic Consulting, estimated that Indian Gaming gross gaming revenue for 2016 of approximately $31.5 billion represented a total economic contribution of $105.4 billion across the U.S. economy.

In line with the growth in Indian gaming, State licensed commercial gaming and State lotteries have also experienced growth. In the early 1980's when Congress began considering legislation addressing Indian gaming, two States had legalized commercial casino gaming and seventeen had State run lotteries. By 2017, twenty-four States had legalized commercial casino gaming resulting in approximately 460 commercial casino locations, excluding locations with State licensed video lottery terminals, animal racetracks without gaming machines, and card rooms. In 2017, the gross gaming revenue for the commercial casino industry represented approximately $40.28 billion and generated approximately $9.2 billion in gaming tax revenue. Further, 44 States were operating State lotteries in 2017.

The expansion of State lotteries and State licensed commercial gaming can place Tribes and States in direct competition for market share. Also, advancements in gaming technology and changes in State and Federal gaming law since the passage of IGRA has shaped the compact negotiation process. As a result, class III gaming compacts have expanded in scope and

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[1] *See, e.g.*, "The Economic Impact of Tribal Gaming: A State-By-State Analysis," by Meister Economic Consulting and American Gaming Association dated November 8, 2018.

[2] *See, e.g.*, "The Nation Indian Gaming Commission's annual gross gaming revenue report for 2021;" *see also* American Gaming Association's press release "2021 Commercial Gaming Revenue Shatters Industry Records, reaches $53B."

complexity as the parties seek mutually beneficial provisions. However, IGRA did not anticipate the compact negotiation process would be between competitors, rather sovereign governments seeking to regulate gaming.

Through IGRA, Congress required Tribes to enter into a compact with a State to conduct class III gaming. 25 U.S.C. 2710(d)(1)(C). IGRA requires States to negotiate class III gaming compacts in good faith, limits the scope of bargaining for class III gaming compacts, and prohibits States from using the process to impose any tax, fee, charge, or other assessment on Tribal gaming operations. 25 U.S.C. 2710(d)(3)(A); 2710(d)(3)(C); and 2710(d)(4).

Under IGRA, the Department has 45 days to complete its review and either approve or disapprove a class III gaming compact. If the Department takes no action within that 45-day period, the Tribal-State gaming compact is considered approved by operation of law – to the extent that it is consistent with IGRA. In order for a compact to take effect, notice of its approval must be published in the *Federal Register*.

The regulations that codify the Department's review process for Tribal-State gaming compacts are found at 25 CFR part 293 and were promulgated in 2008 ("2008 Regulations"). 73 FR 74004 (Dec. 5, 2008). The Department's 2008 Regulations were designed to "address[es] the process for submission by Tribes and States and consideration by the Secretary of Class III Tribal-State Gaming Compacts, and [are] not intended to address substantive issues." 73 FR 74004-5. The Department's consideration of substantive issues appears in a number of decision letters. In addition, a body of case law has developed addressing the appropriate boundaries of class III gaming compacts. Through this rule making, the Department seeks to codify longstanding Departmental policies and interpretation of case law in the form of substantive regulations which would provide certainty and clarity on how the Secretary will review certain provisions in a compact.

On March 28, 2022, the Department published a Dear Tribal Leader Letter announcing Tribal consultation pursuant to the Department's consultation policy and under the criteria in

E.O. 13175, regarding proposed changes to 25 CFR part 293. The Department held two listening sessions and four formal consultation sessions. The Department also accepted written comments until June 30, 2022.

The Dear Tribal Leader Letter included a Consultation Draft of the proposed revisions to 25 CFR part 293 (hereinafter Consultation Draft); a Consultation Summary Sheet of Draft Revisions to part 293; and a redline reflecting proposed changes to the 2008 Regulations. The Dear Tribal Leader Letter asked for comments on the Consultation Draft as well as responses to seven consultation questions.

The Department received a number of written and verbal comments from Tribal leaders and Tribal advocacy groups. The Department also received written comments from non-Tribal entities which are not addressed in the Tribal consolation comment and response but will be included and addressed as part of the public comment record.

IV. SUMMARY OF COMMENTS RECEIVED

A. General Comments

Several commenters commented on the process and timing of the proposed rulemaking process. Some requested additional consultations during the rulemaking process, some requested the Department engage in extensive consultations equating to negotiated rulemaking, and others encouraged the Department to proceed with the rulemaking expeditiously.

The Department acknowledges the comments. The Department seeks to balance robust consultation with expeditious processing of the rulemaking. The Department held four virtual consultation sessions, two in-person listening sessions, and is providing additional opportunities for comment on the proposed regulations, which reflect the significant input of Tribal leaders during the scheduled consultation sessions and their written comments.

A number of commenters responded to the Department's first consultation question: "[d]o the draft revisions increase certainty and clarity in the Secretary's compact review process? Are there additional ways to increase certainty and clarity?" Commenters expressed support for

the proposed revisions to part 293 and noted the Consultation Draft appeared to codify longstanding Departmental policies and interpretation of case law in the form of substantive regulations which would provide certainty and clarity on how the Secretary will review certain provisions in a compact. Commenters also provided a number of specific suggested improvements to specific propose sections, including expressing concerns that some provisions as written are overly broad or vague and may cause confusion. Other commenters cautioned the Department should not apply the proposed regulations in a rigid or paternalistic manner and when possible, defer to a Tribe's sovereign decision making.

The Department acknowledges the comments. The Department seeks to clarify and enforce the proper scope of compacts negotiated under IGRA while deferring to and respecting Tribes' sovereign decision making. The proposed regulations codify existing limitations on Tribes and States negotiating compacts pursuant to IGRA. The Department has addressed specific suggested improvements in the relevant sections below including narrowing some provisions.

A number of commenters responded to the Department's second consultation question: "[d]o the draft revisions provide sufficient guidance to parties engaged in compact negotiations? Are there ways to provide additional guidance?" Commenters expressed support for the Consultation Draft and opined that the proposed new substantive provisions would improve the guidance for negotiating parties. Commenters also recommended the Department include in the proposed rule a codification of the Department's longstanding practice of offering "technical assistance" to negotiating parties. Other commenters noted "sufficient guidance" was a laudable but ultimately unachievable goal. One commenter expressed concern with the Consultation Draft and argued the proposed substantive provisions are cumbersome, unnecessary, and would result in increased requests for technical assistance as Tribes negotiate with State and local governments as required by IGRA.

The Department acknowledges the comments. The Department addresses technical assistance in a separate comment summary and response below. The Department notes the proposed substantive provisions reflect a codification of longstanding Department policy and case law, including the proper scope of a compact. The Department notes intergovernmental agreements between Tribes and States, or local governments can be beneficial, however, Congress provided a narrow scope of topics Tribes and States may include when negotiating a Tribal-State gaming compact.

Commenters requested clarification on whether the proposed regulations would impact ongoing negotiations.

The Department notes the Consultation Draft, and the proposed regulations are prospective and reflect a codification of existing Departmental policy, past precedent, and case law. The Consultation Draft has been made public and the Department encourages Tribes and States that are engaged in negotiations to review the Consultation Draft and the proposed regulations.

A number of commenters requested the Department clarify the effective date of the proposed substantive provisions and questioned whether they would be retroactive. Commenters requested clarification when parties may submit under the new regulations once promulgated. One commenter provided proposed text for a section addressing the effective date and grandfather clause.

The Department has accepted the proposed regulatory text in part and added a section to the proposed rule addressing the effective date of the proposed regulations. The new section is numbered § 293.30. IGRA limits the review period to approve or disapprove compacts or amendments to 45 days. As a result, the Department cannot retroactively approve or disapprove compacts or amendments after the 45-day review period has run.

A number of commenters questioned the Secretary's authority to promulgate substantive regulations interpreting IGRA's scope of compact negotiations. Commenters further questioned

the Secretary's authority to determine evidence of bad faith noting IGRA delegated that role to the courts and requested clarification on how the Secretary will find bad faith.

The Secretary has authority to promulgate these regulations on the procedures for the submission and review of compacts and amendments based on the statutory delegation of powers contained in IGRA and 25 U.S.C. 2, and 9. In enacting IGRA, Congress delegated authority to the Secretary to review compacts to ensure that they comply with IGRA, other provisions of Federal law that do not relate to jurisdiction over gaming on Indian lands, and the trust obligations of the United States. 25 U.S.C. 2710(d)(8)(B)(i)-(iii). IGRA establishes the parameters for topics that may be the subject of compact and amendment negotiations and included in compacts. Thus, in reviewing submitted compacts and amendments, the Secretary is vested the authority to determine whether the compacts contain impermissible topics. The Department recognizes that section 2710(d)(7)(A)(I) vests jurisdiction in district courts over any causes of action … arising from the failure of a State … to conduct [] negotiations in good faith." Therefore, the Department has replaced the phrase "evidence of bad faith" with the phrase "evidence of a violation of IGRA" in the proposed rule. This change harmonizes the Department's regulations, with IGRA's plain language, is prescribing those topics, as addressed by IGRA, that may provide evidence of a violation of IGRA and which a court may find as evidence of bad faith negotiations to assist Tribes with their negotiations.

A number of commenters requested the Department include a "*Seminole* Fix" in the proposed rule, referencing the decision by Supreme Court of the United States in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), holding Congress could not waive a State's sovereign immunity through IGRA. Some commenters recommended the Department provide technical amendments to 25 CFR part 291 in response to *Texas v. United States* (Traditional Kickapoo Tribe), 497 F.3d 491 (5th Cir. 2007) and *New Mexico v. United States* (Pueblo of Pojoaque), 854 F.3d 1207 (10th Cir. 2017). Commenters stated the Fifth Circuit and the Tenth Circuit found part 291 did not provide for an independent forum to make the threshold finding that the subject State failed to

conclude negotiations in good faith and therefore part 291 was too far adrift from Congressional intent to be allowed to stand. Other commenters recommended providing a mechanism for the Department to seek intervention by the Department of Justice when States raise their 11th Amendment Immunity to a Tribe's challenge of bad faith negotiations under IGRA. Commenters noted without a workable *Seminole* fix, Tribes are often at the mercy of the States who are often the Tribe's gaming competitor and seek to undermine Tribal sovereignty. Commenters noted some Tribes are forced to either accept a State's demand for improper provisions or revenue sharing, or risk a notice of violation and closure for operating without a compact.

The Department notes a minority of circuits have invalidated the Department's part 291 Regulations, which were promulgated to provide Tribes with Secretarial Procedures in response to the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which found that Congress lacked the authority to subject States to suits by Indian Tribes under IGRA. The Department is considering all avenues including technical amendments to part 291. The proposed part 293 regulations reflect the Department's efforts to ensure all Tribes may benefit from the goals of IGRA while enforcing IGRA's limited scope of compacts. The inclusion of clear guidance and codification of key tests as well as articulating situations that may be evidence of a violation of IGRA and therefore evidence of bad faith negotiations is a step in this direction. The Department declines to codify a formal process by which Tribes may submit evidence of bad faith in negotiations to the Department for its consideration and referral to the Department of Justice. The Department has long coordinated with the Department of Justice and the National Indian Gaming Commission regarding enforcement or non-enforcement of IGRA's requirement that a Tribe conduct class III gaming pursuant to a compact or secretarial

procedures.[3] The Department will continue to coordinate with the Department of Justice and the National Indian Gaming Commission regarding enforcement of IGRA.

Several commenters requested the Department include additional examples of "bad faith" including: take it or leave it compacts; a State's refusal to offer substantially similar compacts to all Tribes in the State; and a State's refusal to negotiate a compact or amendment until an existing compact is set to expire.

The Department acknowledges these may be examples of bad faith negotiations under IGRA. The Department has included in the proposed rule several provisions which the Department considers to be evidence of a violation of IGRA. The Department will continue to coordinate with the Department of Justice and the National Indian Gaming Commission regarding enforcement of IGRA.

Several commenters requested the Department provide notice to the Department of Justice when a compact is disapproved and request the Department of Justice file a bad faith lawsuit against the State on behalf of the Tribe.

On its face, the disapproval of a compact or amendment is not evidence of bad faith negotiations. If, however, the Tribe provides evidence that the State forced the Tribe to include the disapproved provision, the Department may request the Department of Justice file a bad faith lawsuit on behalf of the Tribe in certain situations.

Several commenters requested the Department publish all compact decision letters as well as deemed approval letters in an accessible index.

The Department acknowledges the comments. The Department strives to publish all compact decision letters as well as deemed approval letters on the Office of Indian Gaming's web site, which includes an accessible index.

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[3] *See, e.g.*, Statement of Indian Gaming in New Mexico, DOJ 95-459 (August 28, 1995); Statement of Indian Gaming in New Mexico, DOJ 95-553 (October 27, 1995); and Justice Department and California announce plan for orderly transition to legal Indian Gaming, DOJ 98-102 (March 6, 1998).

A number of commenters requested the Department include in the proposed rule a formal codification of the Office of Indian Gaming's practice of providing technical assistance to Tribes and States. Some commenters requested a fixed timeline for the Department to issue a technical assistance letter. Other commenters requested the Department include the option for a 'legal opinion' or formal Departmental action in response to some requests for technical assistance.

The Department declines to accept the recommendation. Technical assistance is neither a 'pre-determination' nor 'legal guidance,' rather it is often an explanation of past precedent and interpretation of case law. The Department notes Tribes and States have presented a wide range of unique questions to the Office of Indian Gaming, which may require extensive policy and legal research. Further, depending on the parties' needs and the scope of their requests, some may prefer verbal technical assistance over written technical assistance. The Department will continue to provide technical assistance.

Several commenters discussed their experiences negotiating compacts with States or seeking to enforce disputes under their compacts. Other commenters discussed the importance of Indian gaming to their Tribes as a source of revenue, job growth, and economic self-sufficiency.

The Department acknowledges these comments.

Several commenters discussed legal articles, including work by former Assistant Secretary – Indian Affairs Kevin Washburn.

The Department acknowledges these comments.

Several commenters recommended the Department quote IGRA's statutory language rather than paraphrase the statute as that can result in unintended changes. A commenter recommended the Department narrowly tailor the proposed substantive provisions. Other commenters also noted a primary concern is the definition of gaming activity in § 293.2(d) and used in § 293.23 of the Consultation Draft, § 293.24 of the proposed draft regulations.

The Department adhered closely to the statutory text in the Consultation Draft and the proposed substantive provisions codify longstanding Departmental policy and case law. The Department notes the term "gaming activity" is not defined in IGRA. As discussed below, the Department has revised the definition of "gaming activity" in § 293.2, as well as addressed it in § 293.24.

Consultation Question: Should the draft revisions include provisions that facilitate Statewide remote wagering or internet gaming?

A number of commenters responded to the Department's sixth consultation question: "[s]hould the draft revisions include provisions that facilitate Statewide remote wagering or internet gaming?" The overwhelming majority of commenters agreed that the Department should include provisions relating to i-gaming. Several commenters believe that i-gaming provisions are necessary because Tribes need to be able to compete in the digital industry. Other commenters pointed out that the draft revisions should address i-gaming and provide for its allowance as negotiated between a Tribe and State. Another commenter explained that IGRA encourages agreements between sovereigns.

Several other commenters stated that the State law model of i-gaming is not a substitute for i-gaming under IGRA and Tribes should be able to engage in internet gaming under IGRA. A handful of comments also expressed support for the Department's inclusion but questioned the need to define gaming activity as including the elements of prize, consideration, and chance, as it could potentially be misconstrued in a court ruling that requires all three elements to be present on Indian lands.

Finally, several of the commenters in support of inclusion of i-gaming also praised the Department's i-gaming analysis in the June 21, 2021, Deemed Approved letter to the Seminole Nation. At least three commenters also submitted proposed language for the Department to address i-gaming.

A handful of commenters opposed the Department addressing i-gaming in the draft revisions. One commenter stated that the issue was not ripe for inclusion; another stated that i-gaming was subject to State law and there's no case law to state that the Secretary has power over this topic; another thought that the issue is an unresolved matter of Federal law and the Department should not weigh in; and another believed there is a lack of ability to regulate i-gaming and would harm brick and mortar facilities.

Two commenters did not expressly support or oppose the inclusion of i-gaming; one noted that the Department should further consult with Tribes before making any decisions and the other noted that while the Department's views on the legality of such a provision would be helpful, it is unclear what further provisions would be proposed. Other commenters shared personal experiences and/or legal analysis which helped inform their decision-making.

The Department acknowledges the comments and has added a new section to the proposed rule "§ 293.29 May a compact of amendment include provisions addressing Statewide remote wagering or internet gaming," addressing Statewide remote wagering and internet gaming. The IGRA provides that a Tribe and State may negotiate for "the application of the criminal and civil laws and regulations of the Indian Tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity" and "the allocation of criminal and civil jurisdiction between the State and the Indian Tribe necessary for the enforcement of such laws and regulations." 25 U.S.C. 2710(d)(3)(c)(i)-(ii). The Department's position is that the negotiation between a Tribe and State over Statewide remote wagering or i-gaming falls under these broad categories of criminal and civil jurisdiction. Accordingly, provided that a player is not physically located on another Tribe's Indian lands, a Tribe should have the opportunity to engage in this type of gaming pursuant to a Tribal-State gaming compact.

B. Section Comments

Comments on § 293.1 What is the purpose of this part?

Several commenters recommended the Department revise § 293.1(a) by including the word "or" after the word "and" so that the relevant provision would read "[p]rocedures that Indian Tribes and/or States must use when submitting …." The commenters suggested change would clarify either party may submit compacts or compact amendments.

The Department has accepted this suggested revision and notes that § 293.6 explains either the Tribe or the State may submit the compact or amendment.

Several commenters supported the proposed revisions to § 293.1.

The Department acknowledges the comment.

Comments on § 293.2 How are key terms defined in this part?

Several commenters recommended the Department retain the 2008 Regulation's introductory text for § 293.2 "[f]or purposes of this part, all terms have the same meaning as set forth in the definitional section of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2703 and any amendments thereto."

The Department declines to accept the recommendation to retain the 2008 Regulation's introductory text for § 293.2. The Department proposed changes to the introductory text in § 293.2 to improve clarity.

One commenter recommended the phrasing "[i]n addition to terms already defined in IGRA, this part defines the following additional key terms."

The Department declines to accept the recommendation. One term "Indian Tribe" is defined in IGRA at 25 U.S.C. 2703(5) and refined here as "Tribe." The proposed language indicates the defined terms in § 293.2 are all new or additional terms, which could cause confusion.

Several commenters expressed support for the proposed revisions to § 293.2 and noted the new definitions for key terms are consistent with IGRA.

The Department acknowledges the comments.

Comments on § 293.2(a) – Amendment

Several commenters suggested the definition of *Amendment* in § 293.2(a) and as applied in § 293.4 is too broad. Other commenters suggested the Department clarify the definition of *Amendment* to exclude strictly administrative or procedural amendments from review under § 293.4.

The Department has revised § 293.4 to address these and related comments on that section.

One commenter requested the Department revise the definition of *Amendment* to include "or an amendment to secretarial procedures prescribed under 25 U.S.C. 2710(d)(7)(B)(vii) when such amendment is agreed upon by the Indian Tribe and State." The commenter explained this addition would clarify that any such agreements are treated as a "compact" or "compact amendment" for the purposes of IGRA's 45-day review period.

The Department has accepted the recommendation and include the proposed text in § 293.2(a).

Comments on § 293.2(c) – Extension

Several commenters expressed support for the revised definition of *Extension* in § 293.2(c).

The Department acknowledges the comments.

One commenter recommended the Department remove the words "or amendment" from the definition of *Extension* and noted that § 293.5 does not include the words "or amendment."

The Department notes the terms "Compact" and "Amendment" are frequently used interchangeably depending on the underlying facts and needs of the parties to the agreement. For that reason, the Department used the phrase "compact or amendment" throughout the Consultation Draft of part 293. The Department has made a conforming edit to § 293.5.

Comments on § 293.2(d) – Gaming Activity

Several commenters recommended the Department revise the definition of "gaming activity or gaming activities" in § 293.2(d) by replacing the word "prize" with the word

"reward." The commenters explained the term 'reward' is the more commonly used term in the Tribal gaming industry.

The Department accepted the recommended revision to § 293.2(e), in part. The definition of *gaming activity or gaming activities* now reads "*[g]aming activity or gaming activities* means the conduct of class III gaming involving the three required elements of change, consideration, and prize or reward."

Several commenters expressed concern that including a definition of *Gaming Activity* in part 293 could be construed to require all elements of the gaming activity to occur on a Tribe's Indian lands thereby precluding Tribes from negotiating Statewide mobile or i-gaming in compacts.

The Department acknowledges this concern and has included a new proposed § 292.29 which addresses i-gaming in compacts.

Comments on § 293.2(e) – Gaming Facility

One commenter recommended the Department include a defined term for "gaming spaces" consistent with the rational in the Department's 2021 disapprovals of three California compacts. The commenter explained that including "gaming spaces" defined term would resolve a logical conflict between the Department's definition of *gaming facility* and 25 U.S.C. 2710(d)(3)(C)(vi), which permits a compact to include "standards for the … maintenance of the gaming facility, including licensing." The commenter explained that by defining *gaming facility* as the whole structure for the purposes of building maintenance under the second clause of 25 U.S.C. 2710(d)(3)(C)(vi); and *gaming spaces* for section 2710(d)(3)(C)(i), (ii), the first clause of (vi), and (vii), would provide parties with clarity regarding the appropriate limits of State oversite under IGRA.

The Department accepted the recommendation and has included *gaming spaces* as a defined term and revised the definition of *gaming facility* by moving the clause addressing the gaming spaces to the new paragraph (f) *gaming spaces*. The revised definition of *gaming facility*

addresses the commenter's concern regarding building maintenance and licensing under the second clause of 25 U.S.C. 2710(d)(3)(C)(vi).

A number of commenters addressed the clause addressing the gaming spaces in the proposed definition of *gaming facility* in § 293.2(e).

Several commenters recommended the Department replace the phrase "the spaces that are necessary for conduct of gaming" with the phrase "the spaces that are directly related to, and necessary for, the operation of class III gaming activities." Commenters explained that phrasing is more consistent with how the Department has described the appropriate reach of the term "gaming facility" in a compact.

Several commenters recommended the Department replace the phrase "including the casino floor" with the phrase "such as the casino floor." Commenters explained this change would permit the parties to determine which areas should be properly included and which areas should properly be excluded.

Several commenters recommended the Department revise the phrase "class III gaming device, and storage areas" by adding the word "and" before the phrase and deleting the comma after the word "device" so that the phrase would read "and class III gaming devices and supplies storage areas." Another commenter recommended adding the work "gaming" before the word "supplies" to read "gaming supplies storage areas."

Several commenters recommended adding the phrase "and other secured areas" at the end of the definition.

Several commenters recommended clarifying that the definition of *gaming facility* excludes areas that merely provide amenities to gaming patrons – hotels, restaurants, and other spaces that are not directly used for the conduct of class III gaming.

The Department has accepted the recommended revisions to the clause addressing the gaming spaces in the definition of *gaming facility* in part. The new definition of *gaming spaces* incorporates the suggested revisions and continues to seek the smallest physical footprint of

potential State jurisdiction over a Tribe's land under IGRA. This definition is intended to codify the Department's long-standing narrow read of 25 U.S.C. 2710(d)(3)(C) as applying only to the spaces in which the operation of class III gaming actually takes place. The revised definition of *gaming facility* addresses building maintenance and licensing under the second clause of 25 U.S.C. 2710(d)(3)(C)(vi) and is intended to be narrowly applied to only the building or structure where the gaming activity occurs.[4]

One commenter recommended the Department include the term "structure" to reflect the diversity of structures Tribes utilize for the conduct of Gaming.

The Department has accepted the recommended revision to the definition of *gaming facility*. The definition of *gaming facility* in § 293.2(e) now reads "the physical building or structure, where the gaming activity occurs.

Several commenters recommended the Department include a definition for the term "project" in § 293.2, as part of the definition of the term "gaming facility" in § 293.2(e). The commenters explained that some States have used the term "project" or "gaming project" in conjunction with "gaming facility" to extend State oversight and taxation through triggering extensive environmental reviews and impact or mitigation payments when a Tribe seeks to develop or expand a "gaming facility."

The Department declines to include a definition for the term "project." Proposed revisions to part 293, including the definitions of *gaming facility* and *gaming spaces*, and proposed substantive provisions in §§ 293.24, 293.25, and 293.28 build on the Department's narrow read of the permissible scope of a Tribal State compacts, and is consistent with the Department's disapproval of compacts from the State of California in part due to expansive definitions of "gaming facility" and "project."

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[4] *See, e.g.*, Letter to the Honorable Peter S. Yucupicio, Chairman, Pascua Yaqui Tribe of Arizona, from the Director, Office of Indian Gaming, dated June 15, 2012, at 5, and fn. 9, discussing the American Recovery & Reinvestment Act of 2009 and the IRS's "safe harbor" language to reassure potential buyers that tribally-issued bonds would be considered tax exempt by the IRS because the bonds did not finance a casino or other gaming establishment.

Comments on the term Necessary For

Several commenters recommended the Department define or otherwise articulate a standard for interpreting the term "necessary for" as it is used in 25 U.S.C. 2710(d)(3)(C) and 25 CFR part 293. The commenters further recommended the Department defer to a Tribe's reasonable determination of which provisions in a compact are "necessary for the operation of class III gaming."

The Department notes there is not a strict definition for "necessary," therefore, we must look to the context in which it is used in the statute. As used in IGRA, "necessary" is a limiting phrase, or one that employs the common law use of "necessary" in the strict sense of indispensable or essential.[5] When applying provisions which incorporate "necessary for" in IGRA and in part 293 the Department will ask "is this provision absolutely needed for the Tribe to operate class III gaming?"

Comments on § 293.3 What authority does the Secretary have to approve or disapprove compacts and amendments?

Several commenters supported the proposed revisions to § 293.3, but questioned if the internal cross-reference to § 293.14 is accurate.

The Department acknowledges the comments. The internal cross-reference to § 293.14 appears in the current § 293.3 and the redline reflects a strikeout of "293.14" with the updated cite to § 293.15.

Several commenters recommend that § 293.3 cite the statutory authority of the Secretary to approve or disprove a compact or amendment. Commenters noted other sections in part 293 address the baseline requirements of compact execution and submissions.

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[5] "Like ordinary English speakers, the common law uses 'necessary' in this strict sense of essential or indispensable." *Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100, 106 (3d Cir. 2018) (discussing Congress' use of "necessary" in legislation where no definition provided). "[W]hen Congress wants to loosen necessity to mean just 'sufficiently important,' it uses the phrase 'reasonably necessary.'" *Id.* at 107; *see Ayestas v. Davis*, —— U.S. ——, 138 S. Ct. 1080, 1093 (2018) ("[18 U.S.C. 3599] appears to use the term 'necessary' to mean something less than essential. The provision applies to services that are 'reasonably necessary,' but it makes little sense to refer to something as being 'reasonably essential.'").

The Department has revised § 293.3 to remove references to the signatures of the parties.

One commenter recommended the Department revise § 293.3 by adding the phrase: "and an amendment resulting from another agreement, including, but not limited to, agreements, other documents, dispute resolutions, settlement agreements, or arbitration decisions."

The Department declines to include the proposed language in § 293.3. The Department notes revisions to §§ 293.4, 293.7, and 293.21, address amendments caused by dispute resolution agreement, arbitration award, settlement agreement, or other resolution of a dispute outside of Federal court.

Several commenters recommended the Department revise § 293.3 by adding the phrase: "and applicable approvals of both parties."

The Department declines to include the proposed language in § 293.3. The Department notes revisions to §§ 293.7 and 293.8 address the execution and approval requirements for a compact or amendment.

Comments on § 293.4 Are compacts and amendments subject to review and approval?

Several commenters recommended the Department revise § 293.4 by moving the references to "agreements or other documents" from paragraph (a) to paragraph (b) and removing references to the State including its political subdivisions from paragraph (b). Commenters noted these changes would allow a Tribe to determine which documents are not 'amendments.'

The Department accepted the proposed revisions in part. The Department notes that proposed § 293.21 addresses compact amendments arising from dispute resolution procedures and proposed § 293.27 addresses intergovernmental agreements or memoranda of understanding between the Tribe and the State or its political subdivisions. The Department notes the § 293.4 determination process is open to either party consistent with the submission procedures in Subpart B.

Several commenters recommended the Department split § 293.4(b) into a new section addressing ancillary agreements. The commenters noted this proposed section would strike a balance between documents that amend a compact and are properly subject to Secretarial review and documents or agreements between Tribal regulators and State regulators addressing technical implementation of compact terms. The proposed new section would be titled "[w]hen are ancillary agreements and documents subject to review and approval?" The proposed new section would include three new paragraphs and contain revisions to the text of § 293.4(b).

The Department accepted the proposed revisions in part and incorporated the proposed ancillary agreement test in § 293.4(b).

Several commenters requested the Department codify a streamlined approach for review and approval of technical amendments.

The Department declines to provide a separate "streamlined" procedure for technical amendments. IGRA provides the Secretary with a 45-day review period, which also applies to technical amendments.

Comments on § 293.4(a)

Several commenters questioned if the Secretary's authority under IGRA extended to 'non-compact' agreements between Tribes and States or local governments. Commenters noted that Tribes often find agreements with local governments addressing a myriad of topics – including payments in leu of taxes, service agreements, and mutual aid agreements – are mutually beneficial and in the Tribe's best interest. Commenters further questioned the Department's inclusion of "[a]ny agreement which includes provisions for the payment from a Tribe's gaming revenue …" in § 293.27 as requiring review and determination under § 293.4(c), if such agreements are a "compact" or "amendment."

The Department declines to accept the comments. The Department notes some States have included a requirement in compacts for the Tribe to enter into agreements with local governments often addressing payments by the Tribe for the loss of tax revenue. Some of these

agreements are designed to avoid Secretarial review and impose impermissible taxes or other assessments on the Tribes. IGRA at 25 U.S.C. 2710(b)(2)(B) permits a Tribe to utilize net gaming revenue to fund the Tribe's government, provide for general welfare of the Tribe and its members, promote Tribal economic development, to donate to charitable organizations, and help fund operations of local governments. However, IGRA then at 25 U.S.C. 2710(d)(4) prohibits a State and its political subdivisions from imposing any "tax, fee, charge, or other assessment" on the Tribe for engaging in class III gaming. The proposed § 293.4(c) process is designed to ensure these agreements receive proper scrutiny and are not the result of a State improperly demanding – through its political subdivisions – a tax, fee, charge, or other assessment.

Several commenters requested the Department narrow the scope of § 293.4. The commenters explained that many compacts anticipate the utilization of ancillary agreements between the Tribe and the State to interpret specific compact terms for the purpose of effective operation and regulation of the day-to-day minutiae of operating class III gaming. Commenters noted that the consultation draft of § 293.4 could be construed to capture internal controls, memorandum of understanding between Tribal and State regulatory and licensing bodies, and other documents utilized by the parties to effectively and efficiently ensure the Tribe's class III gaming operation is in compliance with the compact and with IGRA.

The Department has revised § 293.4 to clarify which documents the Department considers within the definition of "amendment" subject to Secretarial review.

Other commenters noted some compacts include mechanisms for the Tribe and the State to add games pursuant to changes in State or Federal law without amending the Compact and noted that the consultation draft of § 293.4 could be construed to capture the Tribe and the State's documentation of games added pursuant to changes in State or Federal law.

The Department has revised § 293.4 to clarify which documents the Department considers within the definition of "amendment" subject to Secretarial review.

Several commenters requested the Department revise § 293.4(a) for consistency with § 293.21 by exempting Federal court decisions from Secretarial review as an 'amendment.'

The Department has revised § 293.4 for consistency with § 293.21 to clarify which documents the Department considers within the definition of "amendment" subject to Secretarial review.

Several commenters raised concerns that the Department's inclusion of "dispute resolution, settlement agreements, or arbitration decisions" within § 293.4's list of documents subject to Secretarial review may discourage parties from utilizing potentially cost-effective dispute resolution methods and would increase burdens on the parties. The commenters argued the expansion of Secretarial review to include dispute resolution, settlement agreements, or arbitration decisions may increase uncertainty. Commenters also recommended the Department defer to a Tribe's determination if a document warrants Departmental review.

The Department has revised § 293.4 for consistency with § 293.21 to clarify which documents the Department considers within the definition of "amendment" subject to Secretarial review.

Other commenters expressed support for the Department's inclusion of "dispute resolution, settlement agreements, or arbitration decisions" within § 293.4's list of documents subject to Secretarial review and noted examples of settlement agreements and arbitration awards which materially change the parties' obligations under the compact in a manner that may conflict with IGRA and would otherwise have been considered an amendment subject to Secretarial review. Commenters noted an example where an arbitration panel decision added a term to the compact changing the Tribe's revenue sharing obligation beyond the compact provisions reviewed by the Secretary. Commenters noted the Tribe determined the arbitration decision amended the compact and sought Secretarial review but was prevented by the State's refusal to certify the arbitration decision as an amendment.

The Department acknowledges the concerns raised by the commenters. The Department notes the proposed changes to part 293 are intended to address these and similar situations. The Department has revised § 293.4 in response to these comments.

Several commenters requested the Department revise § 293.4(a) by removing the phrase "regardless of whether they are substantive or technical."

The Department declines the requested revision and notes that phrase is found in the 2008 Regulations at § 293.4(b). When promulgating the 2008 Regulations the Department had proposed an exception for "technical amendments" but in response to comments on the 2008 Notice of Proposed Rulemaking, removed that provision. 73 FR 74005 (Dec. 5, 2008). The Department explained many commenters questioned how to determine if an amendment was 'substantive' and subject to Secretarial review, or 'technical' and not subject to Secretarial review.

One commenter recommended the Department clarify § 293.4(a) by moving the words "agreements or other documents" after the phrase "including but not limited to" along with conforming grammatical edits.

The Department incorporated the suggested edit in the revised § 293.4(a) and (c).

Comments on § 293.4(b) – which has been renumbered as § 293.4(c)

The Department has renumbered the proposed § 293.4(b) as § 293.4(c) and comments have been edited to reflect the new section number.

Several commenters expressed support for the Department's proposed process in §293.4(c) to provide parties a determination if an agreement is a "compact" or "amendment" and must be submitted for review and approval by the Secretary. Commenters noted this proposed process provides Tribes with a similar service as the National Indian Gaming Commission's "declination letters," which determine if an agreement is a "Management Contract" requiring approval by the NIGC Chair.

The Department acknowledges the comments.

Several commenters requested the Department amend § 293.4(c) by including a deadline for the Department to review the submitted document and to issue a determination letter.

The Department has added a 60-day review period for a determination under § 293.4.

Other commenters requested the Department clarify if a non-party may submit a request for a § 293.4(c) determination.

The Department notes the existing 2008 Regulations at § 293.6 address the processes by which the parties to a Compact may submit it for Secretarial review. In relevant part, § 293.6 states "either party [] to the compact or amendment can submit." The Consultation Draft of § 293.4(c) utilized similar language and stated, "either party may request in writing a determination … if their agreement is a compact or amendment." The Department has consistently and will continue to exclude third parties from the submission and review process.

Several commenters requested the Department amend § 293.4(c) to clarify if the Department's determination letter or materials submitted pursuant to this review would be used by the Department as the basis for an adverse action against the Tribe. Commenters also requested the Department include in a § 293.4(c) determination letter a discussion of any provisions in the underlying document which may lead to subsequent disapproval as a compact under IGRA.

The Department intends for the § 293.4(c) determination process to provide parties with improved clarity whether their agreement or other document is a compact or amendment, without submitting the document for Secretarial review and approval or disapproval. The Department historically has provided parties with technical assistance as well as deemed approval letters which identify problematic provisions. The Department anticipates a § 293.4(c) determination letter may include similar guidance; however, the Department declines to revise § 293.4(c) to require such guidance.

Several commenters requested the Department clarify how and where a party may submit a request and encouraged the Department to allow flexibility in submitting such requests.

The Department has revised § 293.9 to clarify that compacts, amendments, written requests for a determination pursuant to § 293.4(c), or requests for technical assistance must be submitted to the Office of Indian Gaming at the address listed in § 293.9. The Department further notes that § 293.9 has been revised to include the email address "indiangaming@bia.gov".

Several commenters requested the Department amend § 293.4(c) to require the Department's determination letter clearly state in the introduction of the letter either: "Yes. This agreement constitutes a [compact/amendment] requiring secretarial approval" or "No. This agreement does not constitute a [compact/amendment]…."

The Department declines to include the requested requirement within the regulatory text of § 293.4(c). The Department is required to utilize plain writing – in other words clear, concise, and well-organized writing. The Department implements this requirement by providing a brief summary of the document submitted and the Department's determination in the introductory section of decision letters.

Several commenters requested the Department revise the concluding sentence of § 293.4(c) to state: "[t]he Department will issue a letter providing notice of the Secretary's determination." Commenters suggested this would reduce potential ambiguity.

The Department has accepted the requested revision to the concluding sentence of § 293.4(c).

Comments on § 293.5 Are extensions to compacts or amendments subject to review and approval?

Several commenters supported the proposed revisions to § 293.5 and noted the revisions reflected the Department's longstanding practice of treating extensions as a type of amendment which is exempted from Secretarial approval prior to publication of a notice in the *Federal Register.*

The Department acknowledges the comments.

Several commenters requested the Department clarify the distinctions between an "amendment" and an "extension" as defined in § 293.2 and applied in §§ 293.4 and 293.5. Commenters noted an extension may have the effect of changing the "operation and regulation" of a Tribe's Class III gaming activities.

The Department has revised § 293.2(c). The 2008 Regulations adopted the provision exempting extensions from Secretarial review in response to a comment on the draft rule, which had proposed to exempt "technical amendments" but not substantive amendments or extensions. *See* 73 FR 37909 (July 2, 2008) and 73 FR 74005. Extensions are a form of amendment, which changes only the term of the compact, but not other provisions in the compact.

One commenter suggested the Department provide a mechanism for a Tribe to unilaterally extend an existing compact in the event the Tribe and the State are unable to successfully negotiate an amendment or new compact. The commenter noted such a mechanism would incentivize the State to engage in timely good faith negotiations and protect Tribes from risking the expiration of an existing compact due to a State's negotiation delays.

The Department appreciates the concern raised by the commenter but lacks the authority to provide a mechanism for unilateral compact extensions. We will include this type of provision as a best practice in providing technical assistance.

Several commenters questioned if the parties to an approved compact with an automatic renewal provision or automatic extension provision are subject to § 293.5, when the provisions of the compact are satisfied thereby extending the compact.

The Department notes compacts may have provisions allowing for renewal or extensions of the term of the compact if certain provisions are met. The Department does not consider the renewal or extension of the term of the compact under the very terms of the compact as an *extension* as defined in § 293.2(e) and requiring publication of notice in the *Federal Register* under § 293.5. The Department has revised the definition of *extension* to clarify extensions are

new agreements between the parties to extend the compact term rather than the exercise of an existing provision.

Several commenters requested the Department amend § 293.5 to limit the reference to documents required under § 293.8 to paragraph (b) and (c) as required by the 2008 Regulations. Commenters stated the requiring compliance with all of § 293.8 would be a burden on Tribes seeking an extension.

The Department has revised the reference in § 293.5 to 293.8 in response to these comments. Section 293.5 now requires the documents listed in § 293.8(a) through (c). The Department notes the provision in § 293.8(a) reflects the definition of *extension* in § 293.2(e).

Several commenters questioned the necessity for the Department to publish a notice of compact extension in the *Federal Register* in order for the extension to be "in effect." Commenters questioned if the process for extensions may result in undue delay because the extension requires a *Federal Register* document but is exempted from Secretarial review and not subject to the statutory 45-day review period.

The Department disagrees with the comment. An extension is subject to the 45-day statutory review period. Proposed revisions to § 293.5 in the Consultation Draft included clarifying that IGRA requires publication of a notice of extension in the *Federal Register* for the extension to be in effect. The Department notes an extension is an amendment to the duration of the compact and under the proposed regulations continues to receive expedited processing.

Several commenters requested the Department revise § 293.5 to require publication of a notice of compact extension within 14 days of the submission of the extension.

The Department declines to revise § 293.5 to include a 14-day deadline for publishing a notice of compact extension in the *Federal Register.* The Department notes an extension is a type of amendment that receives expedited processing. Further § 293.14 addresses timing of publication of notices in the *Federal Register* in compliance with IGRA.

Several commenters requested the Department revise § 293.5 to exempt restated compacts in the same manner as extensions.

The Department declines the requested revision. A restated compact is a new restatement of existing provisions as amended in a compact, and thus, a new compact subject to review. An extension is an amendment that changes only the duration of the compact, and is not subject to review. IGRA limits the Secretary's authority to review and approve or disapprove a compact or amendment to 45 days. The Department encourages parties to utilize restated compacts or amended and restated compacts as a best practice to incorporate a series of amendments into a single document. The Department finds it helpful if the Tribe or State also submits a redlined copy of the restated compact.

Comments on § 293.6 Who can submit a compact or amendment?

Several commenters sought clarification on whether § 293.6, or other provisions in part 293, exclude third party submissions.

The Department has consistently and will continue to exclude third parties from the submission and review process. The Department's longstanding application of § 293.6 is to permit either party to the compact or amendment to submit the required documents for Secretarial review and approval. The Consultation draft of § 293.6 contained minor stylistic edits for clarity and consistency.

Several commenters expressed support for the proposed revisions to § 293.6.

The Department acknowledges the comments.

Comments on § 293.7 When should the Tribe or State submit a compact or amendment for review and approval?

Several commenters requested the Department revise § 293.7 to more accurately reflect the legal status of the document pending secretarial review, and in some instances, how an amendment may be created through compact dispute resolution procedures. One commenter requested the Department replace the phrase "legally entered into by the parties" with the phrase

"duly executed by the Tribe and State in accordance with applicable Tribal and State law." Another commenter suggested adding the phrase "or the amendment has been issued by an arbitration panel" to the end of § 293.7.

The Department notes the Consultation Draft of § 293.7 remained unchanged from the 2008 Regulations. The phrase "legally entered into" reflects the requirements of the statutory text in IGRA at 25 U.S.C. 2710(d)(8)(A), and is consistent with the requirements in § 293.8, in compliance with both Tribal law and State law. The Department has revised § 293.7 by adding the phrase "or is otherwise binding on the parties" to more accurately reflect how an amendment or other ancillary agreement may be created, as described in § 293.4.

One comment suggested the phrase "legally entered into by the parties" in § 293.7 contradicts § 293.14 because the compact does not take effect until it is published in the *Federal Register.*

The Department has revised § 293.7 to state "duly executed by the Tribe and the State in accordance with applicable Tribal land State law, or is otherwise binding on the parties." IGRA requires the compact or amendment to first be entered into by the parties; second, submitted for review by the Secretary; and third, have notice published in the *Federal Register* prior to the compact or amendment being "in effect." 25 U.S.C. 2710(d)(3)(B).

Comments on § 293.8 What documents must be submitted with a compact or amendment?

Several commenters noted the documents required for submission under § 293.8 may contain confidential business information of the Tribe and requested the Department maintain confidentiality of sensitive business information and protect it from release under the Freedom of Information Act.

The Department routinely receives confidential Tribal business information in response to requests for additional information under § 293.8(d) of the 2008 Regulations. This information is protected from public disclosure under exemption 4 of the Freedom of Information Act. Additionally, prior to releasing any requested tribally submitted information,

the Department consults with the submitting Tribe to confirm such information is confidential business information and can properly be withheld. The Department recommends that as a best practice, Tribes should notify the Department when confidential information is submitted, so that it can be properly withheld if requested under the Freedom of Information Act.

Several commenters noted the documents required by § 293.8, if not submitted, are grounds of disapproval of a compact under § 293.16(b). Commenters requested clarity on how the Department will determine if the requirements of § 293.8 have been met and if the Department will provide parties opportunities to submit missing documents or cure deficiencies in the submitted documents.

The Department notes that § 293.16(b) clarifies that the Department must inform the parties in writing of any missing documents required by § 293.8.

Several commenters requested the Department revise § 293.8 to include an express waiver the Secretary may invoke if or when either party shows a need for additional flexibility in submitting a compact or amendment. Commenters noted parties to a compact who resort to arbitration or similar dispute resolution may be reluctant to provide the required certification of an arbitration panel decision under § 293.8(b) and (c) in an effort to avoid Secretarial review or enforcement of an unfavorable decision.

The Department declines to include a blanket waiver under § 293.8, but notes the Secretary may consider issuing a discretionary waiver in certain circumstances after consideration of the submitted documents. Certain documents, such as arbitration decisions, are self-certifying. Section 293.16 addresses the Secretary's discretionary authority to disapprove a compact or amendment.

Some commenters also noted that a Tribe may choose to adopt a compact or amendment, including an arbitration award, under protest and requested the Department revise § 293.8(b) to allow for a Tribe to adopt a compact or amendment under protest.

The Department declines to include the requested revision. Section 293.8(b) requires a Tribal resolution or other document that certifies that the Tribe has approved the compact or amendment in accordance with applicable Tribal law. The Department notes that a Tribal resolution or cover letter may articulate that the Tribe's 'approval' is under protest or identify provisions in the compact or amendment that the Tribe disagrees with or is concerned violate IGRA.

One commenter questioned the Department's proposed change of pronoun in § 293.8(c) from "he or she" to "they."

The Department made certain stylistic edits including using a gender-neutral pronoun in § 293.8(c), which is the only section that uses a pronoun.

Several commenters expressed support for the proposed revisions to § 293.8. Commenters noted that the proposed § 293.8(d) reflects proposed changes to §§ 293.4, 293.21, and 293.27, which address certain types of ancillary documents which are sometimes referenced or required by a compact or amendment.

The Department acknowledges the comments.

Several commenters expressed concern with § 293.8(d) and questioned if the documents required by § 293.8 were subject to secretarial review and approval. Commenters noted that the Consultation Draft of § 293.4 expanded the Department's definition of compacts or amendments subject to Secretarial review and appeared to conflict with § 293.8(d). Commenters further noted §§ 293.4 and 293.8(d) could capture Tribal Gaming ordinances and / or minimum internal control standards which may not be drafted at the time of compact submission. Commenters noted a broad reading of § 293.8(d) posed an undue burden on Tribes and impermissibly intruded into Tribal self-governance and self-determination.

The Department has revised § 293.8(d) to clarify this provision does not apply to Tribal Gaming Ordinances subject to review and approval by the Nation Indian Gaming Commission pursuant to 25 U.S.C. 2710 and 25 CFR part 522. Further, the Department has revised § 293.4 to

clarify which documents are compact or amendments subject to Secretarial review. The documents identified in § 293.8(d) allow the Department to understand how the compact or amendment interacts with other documents and agreements, which in some instances are treated as grounds for material breach of the compact. The Department notes in some instances compacts have utilized ancillary documents to improperly impose State law or State law equivalent onto Tribal governments and a Tribe's Indian lands.

Several commenters requested the Department revise § 293.8(d) by including the phrase "provided however that nothing herein shall prohibit the amendment, modification, or other changes to Tribal ordinance or laws and any such change, amendment, or modification is not required to be submitted for review and approval unless otherwise expressly required by Federal law."

Several commenters requested the Department amend proposed § 293.8(d) to state that any agreement between a Tribe and a State, its agencies or its political subdivisions required by a compact or amendment if the agreement requires the Tribe to make payments to the State, its agencies, or its political subdivisions, or it restricts or regulates a Tribe's use and enjoyment of its Indian Lands. Commenters argued this language is more narrowly tailored and addresses the concerns raised in § 293.28 of the Consultation Draft. Commenters requested the Department defer to a Tribe's decision to provide voluntary payments to local governments as permitted by IGRA at 25 U.S.C. 2710(b)(2)(B)(v).

One commenter suggested comprehensive revisions to Section 293.8, including renumbering the subsections and adding two new sections. The commenter proposed adding references to amendments arising out of dispute resolution processes including arbitration. The commenter proposed adding a new section addressing the Secretary's authority to waive the requirements of § 293.8. The commenter also proposed adding a section requiring the Secretary to provide notice to the parties within 14 business days if the Secretary determines documents

required by § 293.8 are missing and permit the parties to either submit the documents or request a waiver of § 293.8.

The Department declines to include the requested new provisions in § 293.8. The Department notes that the requested provision addressing the Secretary's authority to offer a wavier under 25 CFR 1.2 is not required for the Secretary to issue a waiver of specific requirements. The Department also notes that the requested provision addressing a notice to the parties providing an opportunity to cure deficiencies reflects the Department's longstanding practice. Additionally, the remaining language in that provision addresses the Secretary's authority to disapprove a compact or amendment and is addressed in § 293.16.

Several commenters expressed concerns with § 293.8(e), arguing the section is vague and ambiguous, potentially permitting the Department to request documents unrelated to the Secretary's review of the submitted compact.

The Department notes § 293.8(e) in the Consultation Draft retains the text of § 293.8(d) in the 2008 Regulations. This provision allows the Department to request additional information – when needed – to determine if a submitted compact complies with IGRA.

Comments on § 293.9 Where should a compact or amendment be submitted for review and approval?

A number of commenters responded to the Department's seventh consultation question "[s]hould the draft revisions include provisions that offer or require the submission of electronic records?" Commenters encouraged the Department to include provisions allowing electronic submission but cautioned against requiring electronic submission. Commenters noted electronic submission is less expensive and is faster than traditional methods of submission. Commenters also noted parties should be provided reasonable flexibility when submitting compacts or amendments for Secretarial Review. Several commenters questioned the need for the inclusion of electronic submission in the proposed regulations, noting in their experience the technical

requirements of submission are not a significant consideration between parties negotiating a compact.

The Department acknowledges the comments and has included the Office of Indian Gaming's email address in § 293.9. The Department notes the Consultation Draft included proposed revisions to the 2008 Regulations which were stylistic or technical in nature including electronic submission.

Several commenters requested the Department revise § 293.9 by removing the requirement for hard copy submission of the "original copy" when a party chooses to utilize email submission. Commenters noted that the Department could request an original hard copy if needed under § 293.8(e). Commenters also noted many Tribal and State governments as well as the gaming industry are utilizing electronically signed and verified documents.

The Department will reevaluate the requirements in § 293.8(a) for an "original compact or amendment executed by both the Tribe and the State" and § 293.9 "as long as the original copy is submitted to the address listed above" as the Department updates the record keeping requirements. The Office of Indian Gaming is the formal record keeper and archivist of Tribal-State gaming compacts for the Department. The Office is bound by Departmental record keeping requirements, including electronic records.

Comments on § 293.10 How long will the Secretary take to review a compact or amendment?

Several commenters expressed support for the proposed revisions to § 293.10.

The Department acknowledges the comments.

Comments on § 293.11 When will the 45-day timeline begin?

Several commenters recommended the Department amend § 293.11 to allow for electronic submissions to trigger the 45-day review period upon submission by removing the requirement for the Office of Indian Gaming to stamp the document received. Commenters argued that the inclusion of a date stamp for electronically submitted documents is no longer necessary to confirm when the document was received. Commenters also noted the requirement

for the Office of Indian Gaming to date stamp a document received could result in administrative delays.

The Department declines to remove the requirement for the Office of Indian Gaming to stamp the document received in order for the 45-day review period to begin for electronically submitted documents. The Department notes the Consultation Draft of § 293.11 reflects the removal of the cross reference to § 293.9 and the address of the Office of Indian Gaming. The consultation draft of § 293.9 was amended to include a dedicated email address for the Office of Indian Gaming to facilitate email submission of documents. The application of a date stamp for submitted documents irrespective of the submission method allows for consistent timely processing of all documents.

Several commenters requested the Department amend § 293.11 to include a requirement that the Office of Indian Gaming provide submitters with an email acknowledgement of receipt with confirmation of the 45-day review period.

The Department has revised § 293.11 to include an emailed acknowledgement of receipt to the parties when the parties have provided their email addresses.

Several commenters noted an apparent conflict between §§ 293.11 and 293.9 and requested clarification if the 45-day review period begins with the receipt of the electronic copy or upon receipt of the mailed original copy.

The Consultation Draft reflected revisions in §§ 293.9 and 293.11 to allow for electronic or hard copy submission. The Department has revised § 293.9 to clarify the Department will accept either email or hard copy submission but requires a hard copy submission in addition to the emailed copy. The 45-day review period starts when the Office of Indian Gaming date stamps a hard copy original or an electronic copy of the document.

Comments on § 293.12 What happens if the Secretary does not act on the compact or amendment within the 45-day review period?

Several commenters noted that it was unclear what the legal effect is for a compact or amendment "approved by operation of law" or "deemed approved" when a guidance letter is issued after the 45-day review period.

The Department acknowledges the comments. A guidance letter issued after the 45th day review period does not alter the effective date of the compact or amendment. The effective date of a compact or amendment is the date the document is published in the *Federal Register*, as explained in § 293.14. A compact or amendment approved by operation of law is considered to have been approved by the Secretary, but only to the extent the compact or amendment is consistent with the provisions of IGRA. A guidance letter explains the provisions the Department believes to be inconsistent with IGRA.

Many commenters noted that the added language effectively codifies the Secretary's current practice.

The Department acknowledges the comments.

One commenter indicated that the provision conflicts with the Secretarial requirements under § 293.10.

The Department disagrees with the comment. The proposed regulations at § 293.12 explain what happens if the Secretary does not act on the compact or amendment within the 45-day review period.

Several commenters stated that it was unclear if there would be a process to appeal a guidance letter issued after the 45-day review period, with one commenter suggesting that the Secretary should consider including an appeal or review process.

The Department acknowledges the comments but declines to amend the provision to include an appeal or review process.

One commenter stated that it was unclear from the provision if the Secretary's issuance of a guidance letter under this provision would impact the publication of a "deemed approved" compact in the *Federal Register*.

The Secretary's issuance of a guidance letter under this provision does not impact the publication of a "deemed approved" compact in the *Federal Register*. A guidance letter issued after the 45-day review period does not alter the effective date of the compact or amendment. The effective date of a compact or amendment is the date the notice is published in the *Federal Register,* as explained in § 293.14.

Several commenters expressed concern that the Secretary could "unapprove" a compact or amendment through issuance of a guidance letter. These commenters requested that the Department specifically address the effect of a guidance letter on a compact's approval and which provisions are not deemed approved. One commenter expressed concern that if the Secretary takes no action or issues a guidance letter, a court may interpret the Secretary's guidance letter or inaction to mean that the compact violates IGRA and is void, potentially leaving a Tribe without the authority to continue to offer gaming under the compact. One commenter based its concern on the relationship between §§ 293.12 and 293.15.

The Department acknowledges the comments. Under IGRA, the Department has 45 days to complete its review and either approve or disapprove a class III gaming compact. If the Department takes no action within that 45-day period, the Tribal-State gaming compact is considered approved by operation of law – to the extent that it is consistent with IGRA. A guidance letter issued after the 45th day of the review period does not alter the effective date of the compact or amendment. The effective date of a compact or amendment is the date the notice is published in the *Federal Register*, as explained in § 293.14. A compact or amendment approved by operation of law is considered to have been approved by the Secretary, but only to the extent the compact or amendment is consistent with the provisions of IGRA. A guidance letter explains the provisions the Department believes to be inconsistent with IGRA.

One commenter disagreed with the inclusion of § 293.12 and stated that the Secretary should not issue guidance letters after the 45-day review period because the Secretary should only act within the 45-day review period and not beyond.

The Department disagrees with the comment. A compact is not "considered to have been approved" by operation of law also known as "deemed approved" until after the 45-day review period. The Department cannot issue a guidance letter until after the 45th day.

One commenter stated that the Secretary has an obligation to ensure that compacts between Tribes and States are rejected if they violate the provisions of IGRA and stated that § 293.12 appears to permit the Secretary to allow compacts that violate IGRA to be "deemed approved" without alerting the relevant State, Tribe, or the public that provisions of the "approved" compact violate IGRA. The commenter recommended that § 293.12 be amended to state that "[t]he Secretary, after the 45th day, is required to issue a guidance letter to the parties identifying any provisions that are inconsistent with IGRA and thus not approved by operation of law." Another commenter suggested the Department add language stating "Accordingly, the signatory Tribe or State may subsequently challenge the non-compliant compact provisions as unenforceable or severable from the compact."

The Department accepts the comments in part and will make the appropriate changes to § 293.12, indicating the Secretary will issue a letter confirming the 45-day review period has lapsed and therefore the compact or amendment has been approved by operation of law. The Secretary's letter may identify provisions of the "deemed approved" compact that violate IGRA. The Department takes no position on whether a Tribe or a State may subsequently challenge the non-compliant compact provisions as unenforceable or severable from the compact.

One commenter recommended that the language in this section stating that "[t]he Secretary is not required to issue a letter, and if the Secretary does issue a letter, any such letter may offer guidance to the parties on the Department's interpretation of IGRA," be stricken.

The Department agrees with the changes and will strike the language from § 293.12. The Secretary will issue a letter confirming the 45-day review period has lapsed and therefore the compact or amendment has been approved by operation of law.

Many commenters requested that the Department state how it will determine whether to issue a guidance letter and articulate a standard to promote the uniform issuance of guidance letters. These commenters expressed concern that if the Secretary is not required to issue a guidance letter, the lack of a guidance letter may place some Tribes on unequal footing. These commenters request that § 293.12 be revised to articulate a standard that will ensure the uniform issuance of guidance letters.

The Department accepts the comments in part and will make the appropriate changes to § 293.12, indicating the Secretary will issue a letter confirming the 45-day review period has lapsed and therefore the compact or amendment has been approved by operation of law. The Secretary's letter may include guidance identifying provisions of the "deemed approved" compact that violate IGRA.

One commenter recommended that the Department clarify whether revised § 293.12 is intended to be a change in Department policy or a drafting error.

The Department acknowledges the comment. Section 293.12 will reflect a change in policy to issue a letter in each instance when a compact is deemed approved and clarify that letter may include guidance identifying provisions of the "deemed approved" compact that violate IGRA.

Several commenters requested the inclusion of a deadline by which the Secretary will issue a guidance letter. One commenter requested that § 293.12 be revised to provide that guidance letters be issued within 60 days of the date a compact is approved by operation of law in order to provide Tribes with certainty with respect to renegotiating terms of a compact and avoid lost time negotiating provisions the Department finds are in conflict with IGRA.

The Department accepts the comments in part. Section 293.12 will reflect that the Secretary will issue a letter after the 45th day but within 90 days from the date of submission. This timeline is consistent with the requirement to publish notice in the *Federal Register* in § 293.14.

Several commenters expressed concerns that the Secretary has no explicit statutory authority to issue a guidance letter. One commenter expressed concerns that a guidance letter, which is not required to be issued under IGRA, could be used as a litigation roadmap, potentially to oppose the project, and may pin the Secretary to a litigation position. The commenter suggested further discussion and requested that the Secretary consider a process that would provide confidentiality to the Tribe and State by, for example, communicating to the attorneys for the respective Tribe and State the Secretary's concerns if any provisions were inconsistent with IGRA to discuss perceived inconsistencies.

The Department acknowledges the comment. The Secretary has authority to promulgate these regulations based on the statutory delegation of powers contained in IGRA and 25 U.S.C. 2, and 9 to review compacts and amendments. A guidance letter issued after the 45th day review period does not alter the effective date of the compact or amendment. A compact or amendment approved by operation of law is considered to have been approved by the Secretary, but only to the extent the compact or amendment is consistent with the provisions of IGRA. A guidance letter explains the provisions the Department believes to be inconsistent with IGRA. The Department currently offers technical assistance to Tribes and States; however the Department does not provide pre-approvals or legal opinions.

One commenter noted that "deemed approval" letters have had the effect of allowing States like California to attempt to use the letter as a way of forcing impermissible provisions into compacts.

The Department accepts the comments in part and will make the appropriate changes to § 293.12, indicating the Secretary will issue a letter informing the parties that the compact or amendment has been approved by operation of law, the letter may identify provisions of the "deemed approved" compact that violate IGRA.

One commenter recommended that the revised regulations be modified to expressly state the principles underlying the policy of issuing "deemed approved" letters and the limits of that policy.

The Department accepts the comments in part and will make the appropriate changes to § 293.12, indicating the Secretary will issue a letter informing the parties that the compact or amendment has been approved by operation of law. The letter may identify provisions of the "deemed approved" compact that violate IGRA. The Department declines to expressly state when the letter will include guidance or limits to that policy.

One commenter noted that States are often dismissive of "deemed approved" letters and requested that the Department revise the language to state that "[a]ccordingly, the signatory Tribe or State may subsequently challenge the non-compliant compact provisions as unenforceable or severable from the compact," stating that this additional language would eliminate State's false perception that an approval by operation of law is de facto approval of a State's "illicit agenda in compact negotiations."

The Department acknowledges the comment. Under IGRA, the Department has 45 days to complete its review and either approve or disapprove a class III gaming compact. If the Department takes no action within that 45-day period, the Tribal-State gaming compact is considered approved by operation of law – to the extent that it is consistent with IGRA. The Department takes no position on whether a Tribe or a State may subsequently challenge the non-compliant compact provisions as unenforceable or severable from the compact.

Several commenters recommended that § 293.12 be amended to allow Tribal governments to request guidance letters and legal opinions from the Secretary or the Office of Solicitor for compacts.

The Department acknowledges the comment. The Department currently offers technical assistance to Tribes and States; however the Department does not provide pre-approvals or legal opinions.

One commenter stated that the issuance of a guidance letter explaining why a submitted compact was not affirmatively approved but "deemed approved" by operation of law was a solid improvement, noting that such letters provide an excellent source to inform and improve the negotiation process.

The Department acknowledges the comment.

Comments on § 293.13 Who can withdraw a compact or amendment after it has been received by the Secretary?

Several commenters requested the Department revise § 293.13 by adding the word "both" so that the relevant provision reads "Tribe and State must both submit."

The Department accepts the requested revision. The Department notes the parties may submit a joint request for withdrawal of the compact or amendment, or submit individual requests for withdrawal.

One commenter recommended the Department accept electronically submitted requests for withdrawal.

The Department accepts the requested revision and has revised § 293.9 to clarify all submissions and requests under part 293 must be submitted to the Office of Indian Gaming, either at the physical address or the email address.

One commenter requested the Department revise § 293.9 to permit a Tribe to unilaterally withdraw a compact or amendment after submission.

The Department declines the requested change and notes this requirement remains unchanged from the 2008 Regulations, which requires both parties to request withdrawal. The compact process under IGRA is a formalized contract between sovereigns which is submitted to the Department for review and approval only after it is legally entered into or is otherwise binding on the parties.

Comments on § 293.14 When does a compact or amendment take effect?

Several commenters requested clarity of the effect of an approval by operation of law on a compact and subsequent publication of a notice in the *Federal Register*.

The Department acknowledges the comments. The Department notes IGRA provides a 45-day review period after which a compact is approved by operation of law but only to the extent the compact is consistent with IGRA. 25 U.S.C. 2710(d)(8)(C). A notice must also be published in the *Federal Register* for the compact to be in effect. 25 U.S.C. 2710(d)(8)(D).

One commenter requested the Department amend § 293.14 by changing the timeline for publication of a notice in the *Federal Register* from 90 days to 55 days from the date the compact or amendment is received to, or within 10 days of approval/disapproval, whichever is shorter.

The Department declines the requested change in the *Federal Register* notice timeline, which remains unchanged from the 2008 Regulations and is considered reasonable. The Department notes IGRA does not require publication of a notice in the *Federal Register* if the compact or amendment is disapproved.

Comment on § 293.15 Is the Secretary required to disapprove a compact or amendment that violates IGRA?

Several commenters agreed with the Department's proposed language in § 293.15, explaining that the Secretary has the discretionary authority to disapprove a compact that violates IGRA, but is not required to do so. However, many of the commenters that agreed with the Department's proposed language did express concern over the possibility that the language could encourage future administrations to avoid disapproving compacts where appropriate. Other commenters noted the importance of Deemed Approval determinations to empower Tribes to reject the non-compliant provisions of a deemed approved compact through litigation or other means.

The Department acknowledges the comments. The Department retains its proposed language in § 293.15. The Department is concerned a mandate that the Secretary affirmatively

disapprove compacts that violate IGRA would narrow the discretion IGRA provides to the Secretary to either disapprove or approve a compact within a 45-day review period. Furthermore, this type of mandate could create unintended consequences if the Department fails to act within the prescribed 45-day review period on a compact that violates IGRA. The current language, which tracks the language of IGRA, provides that if the Secretary fails to act within the 45-day review period, the compact is deemed approved but only to the extent it is consistent with IGRA.

Several commenters expressed concern with the Department's proposed language in § 293.15 and argued that a compact which violates IGRA must be affirmatively disapproved. Another commenter went as far as stating that allowing compacts to go into effect that should be disapproved is a violation of IGRA.

The Department acknowledges the comments. The Department retains its proposed language in § 293.15. The Department is concerned a mandate that the Secretary affirmatively disapprove compacts that violate IGRA would narrow the discretion IGRA provides the Secretary to either approve or disapprove a compact within the prescribed 45-day review period. Furthermore, this type of mandate could create unintended consequences if the Department fails to act within the prescribed 45-day review period on a compact that violates IGRA. The current language, which tracks the language of IGRA, provides that if the Secretary fails to act within the 45-day time period, the compact is deemed approved but only to the extent it is consistent with IGRA.

Finally, a few commenters agreed that the Secretary has discretionary authority over whether to disapprove a compact but should be required to issue a guidance letter or legal opinion identifying provisions not approved under IGRA. Commenters recommended the Secretary defer to a Tribe's sovereign decision-making and permit compacts to go into effect rather than disapprove.

The Department acknowledges the comments. The Department retains its proposed language in § 293.15. The Department is concerned a mandate that the Secretary affirmatively disapprove compacts that violate IGRA would narrow the discretion IGRA provides the Secretary to either approve or disapprove a compact within the prescribed 45-day review period. Furthermore, this type of mandate could create unintended consequences if the Department fails to act within the prescribed 45-day time period on a compact that violates IGRA. The current language, which tracks the language of IGRA, provides that if the Secretary fails to act within the 45-day time period, the compact is deemed approved but only to the extent it is consistent with IGRA. The Department has revised § 293.12 to provide the Secretary will issue a letter informing the parties that the compact or amendment has been approved by operation of law and the letter may include guidance.

Comments on § 293.16 When may the Secretary disapprove a compact or amendment?

Several commenters requested the Department clarify § 293.16(a)(3) and suggested the provision is overly broad.

The Department acknowledges the comments, but notes this provision is consistent with Congress's grant of discretionary disapproval authority to the Secretary.
25 U.S.C. 2710(d)(8)(B)(iii).

Several commenters recommended the Department revise § 293.16(a)(3) to include an opportunity for an appropriate designee of the Secretary to serve as a mediator to facilitate fair compact negotiations between a Tribe and a State and to ensure that Federal law is complied with by the parties.

The Department acknowledges the comments. The Department routinely provides technical assistance to Tribes and States including guidance on Departmental precedents and past procedures, the Departments interpretation and application of case law, as well as best practices.

One commenter requested the Department include a new section titled "[m]ay a compact or amendment include provisions that violate the trust obligations of the United States to

Indians?" The proposed text for this section would explain that a compact may not include provisions that violate the trust obligations of the United States and cited to provisions limiting third-party Tribe's rights to conduct gaming as an example of a provision violating the trust obligation.

The Department declines the requested new section and notes § 293.24(c)(1) addresses compact provisions which act to limit a third-party Tribe's rights to conduct gaming.

Several commenters expressed support for the proposed § 293.16(b) and noted it helps enforce the requirements in other sections of part 293.

The Department acknowledges the comments.

Several commenters objected to the proposed § 293.16(b) which provides the Secretary may disapprove a compact if the documents required in § 293.8 are not submitted. Commenters questioned the Secretary's authority to disapprove a compact based on the parties' failure to submit specific documents. Several commenters expressed concerns that the document required by § 293.8(d) may be overly broad and burdensome. Other commenters recommended the Department revise § 293.16 to require written notice of deficiencies and an opportunity to cure before disapproving a compact under § 293.16(b).

The Department accepts the comments and notes § 293.16(b) provides the Secretary with grounds to disapprove a compact if the documents required by § 293.8 are not submitted. The Department has revised § 293.16(b) to require written notice of deficiencies, which is consistent with the Department's longstanding practice of informing parties of deficiencies and permitting parties to cure the deficiencies. IGRA provides the Secretary with discretionary authority to disapprove a compact if it violates one of the three specified criteria. 25 U.S.C. 2710(d)(8)(B). Section 293.16(b) allows a presumption that a compact violates one of the three specified criteria if the parties fail to cure deficiencies in the record.

Several commenters requested the Department revise § 293.16(b) to provide if the parties fail to submit the required documents in § 293.8, the Secretary will return the compact as

incomplete. The commenters recommended the Department clarify that the parties may resubmit the compact or amendment after it has been returned based on the failure to submit the required documents, but must submit all of the required supporting documents.

The Department declines to accept the requested provisions. IGRA provides the Secretary with 45-days to review and approve or disapprove a compact. The Secretary does not have the authority to return a compact as incomplete which could frustrate Congress's clear intent to prevent unnecessary delay by providing a 45-day review period.

One commenter recommended the Department revise § 293.16 by including a provision permitting the Secretary while reviewing an amendment to a compact to disapprove provisions in the underlying compact or amendment which was approved by operation of law if that provision violates one of IGRA's three specified criteria.

The Department declines to include the proposed provision. IGRA limits the Secretary's authority to review and approve or disapprove a compact or amendment to 45 days. As a result, the Department cannot retroactively approve or disapprove a compact or amendment after the 45-day review period has run. Instead, the Department's review is limited to the text of the document under review during the 45-day review period. The Department treats restated and resubmitted compacts as a new compact because the parties have submitted entire text of the compact for review. The Department encourages parties to utilize restated compacts or amended and restated compacts as a best practice to incorporate a series of amendments into a single document. The Department finds it helpful if the Tribe or State also submits a redlined copy of the restated compact.

Comments on § 293.17 May a compact or amendment include provisions addressing the application of the Tribe's or the State's criminal and civil laws and regulations?

Several commenters expressed support for the proposed § 293.17.

The Department acknowledges the comments.

Several commenters recommended the Department revise § 293.17 to clarify how the parties can comply with the requirement to "show that these laws and regulations are both directly related to and necessary for, the licensing and regulation of the gaming activity." Commenters noted this provision adds a vague new requirement that could cause confusion.

The Department accepts this comment in part. The Department has revised § 293.17, to clarify the Secretary may ask for a showing that the provisions addressing the application of criminal and civil laws and regulations are both directly related to and necessary for, the licensing and regulation of the gaming activity.

Several commenters addressed § 293.17 in responding to the Department's third consultation question "[s]hould the draft revisions include provisions that facilitate or prohibit the enforcement of State court orders related to employee wage garnishment or patron winnings?" Commenters suggested the parties may address the effect of such State (or Tribal) court orders as a jurisdictional matter under § 293.17.

The Department declines to address the enforcement of State court orders related to employee wage garnishment or patron winnings in § 293.17. The Department has added enforcement of State court orders to the list of provisions in a compact which are not directly related to the operational gaming activities in § 293.24(c). The Department notes this is consistent with the 9th Circuit decision in *Chicken Ranch Ranchera of Me-Wuk Indians v. California*, 42 F.4th 1024 (9th Cir. 2022).

Comments on § 293.18 May a compact or amendment include provisions addressing the allocation of criminal and civil jurisdiction between the State and the Tribe?

A number of commenters responded to the Department's fourth consultation question: "[s]hould the draft revisions include provisions that facilitate or prohibit State court jurisdiction over the gaming facility or gaming operations? Should this apply to all claims or only certain types of claims?"

Many commenters discouraged the Department from including provisions which could be perceived as permitting or facilitating State court jurisdiction because States have a history of leveraging limited grants of jurisdiction to undermine Tribal sovereignty. Commenters noted while IGRA includes allocation of jurisdiction it also is intended to promote strong Tribal governments which includes strong Tribal courts. Other commenters noted Tribal courts should be the default jurisdiction, however court jurisdiction could be left to negotiations between a Tribe and State, at the request of a Tribe when the Tribal court does not have the capability to take full jurisdiction over the relevant claims. Commenters also discussed case law supporting the presumption that Tribal court is the proper venue for third party claims – including patron disputes, labor disputes, and tort claims against the Tribe arising out of the Tribe's gaming facility.

The Department acknowledges the comments. The Department proposed § 293.18 to clarify the Department reads IGRA's provision permitting Tribes and States to allocate criminal and civil jurisdiction narrowly and limited by § 293.17. The Department has addressed third party tort claims in proposed § 293.24(c).

Several commenters supported the proposed § 293.18, as drafted, and noted it appears consistent with IGRA and case law. Commenters also noted the proposed provision could help preserve Tribal court systems.

The Department acknowledges the comments.

Several commenters questioned the need for the proposed § 293.18.

The Department acknowledges the comments. The Department notes IGRA provides a compact may include provisions relating to the allocation of criminal and civil jurisdiction between the State and the Tribe necessary for the enforcement of such laws and regulations. 25 U.S.C. 2710(d)(3)(C)(ii).

Several commenters requested the Department include a bad faith standard for jurisdiction when a State seeks to compel State jurisdiction of the Tribe or Indian country.

The Department acknowledges the comments. The Department has added provisions in § 293.24(c) to address these concerns, which § 294.24(d) now states are "considered evidence of a violation of IGRA."

Several commenters requested the Department amend proposed § 293.18 to expressly require the Tribe to request the State take jurisdiction over claims involving the gaming facility or gaming operations in order for such an allocation of jurisdiction to be proper.

The Department did not adopt the comment. A compact or amendment may include provisions allocating criminal and civil jurisdiction between the State and the Tribe necessary for the enforcement of the laws and regulations described in § 293.17.

Several commenters requested the Department revise § 293.18 to prohibit State court jurisdiction over Tribal gaming operations or facilities.

The Department did not adopt the comment. A compact or amendment may include provisions allocating criminal and civil jurisdiction between the State and the Tribe necessary for the enforcement of the laws and regulations described in § 293.17.

Comments on § 293.19 May a compact or amendment include provisions addressing the State's costs for regulating gaming activities?

A number of commenters expressed support for the proposed § 293.19. Commenters noted States have used IGRA's regulatory cost provision as an indirect tax often funding both regulatory and non-regulatory functions. Commenters opined the bad faith standard would assist negotiating parties in limiting regulatory cost provisions and Tribal oversite over the State's use of those funds. Commenters also noted the Department will likely receive severe pushback from States on this provision and encouraged the Department to "stay the course."

The Department acknowledges the comments. Section 293.19 addresses Tribal payments for the State's costs of regulating gaming activities. As explained above the Department has replaced the phrase "evidence of bad faith" with "evidence of a violation of IGRA."

Several commenters expressed concern with the inclusion of a bad faith standard in proposed § 293.19. Commenters questioned the Secretary's authority to determine bad faith and questioned how the Department would enforce such a provision over the life of the compact.

IGRA provides the Secretary with the authority to review and approve or disapprove a compact within a 45-day review period. The Department evaluates the terms of the compact including auditing standards for assessments of regulatory costs as part of this review. The Department has revised § 293.19 to clarify the Secretary's review is limited to the terms of the compact. Enforcement of those terms lies with the parties and is governed by the compact's dispute resolution provisions, if any. As explained above, the Department has replaced the phrase "evidence of bad faith" with "evidence of a violation of IGRA."

Several commenters requested the Department provide definitions for "actual and reasonable" and provide boundaries on the types of costs for which the State may reasonably seek reimbursement. Other commenters requested the Department allow flexibility for States to aggregate costs with limits on what costs can be aggregated.

The Department declines to provide specific boundaries on the types of gaming regulatory costs for which the State may seek reimbursement. The Department reads IGRA's provision permitting the State to assess regulatory costs narrowly and inherently limited to the negotiated allocation of regulatory jurisdiction. Providing specific definitions would diminish parties' flexibility in negotiating a reasonable allocation of regulatory jurisdiction that best meets the needs of the parties. Further, the Department has revised § 293.19 to give parties the flexibility in negotiating the terms of a compact to determine how the State will show aggregate costs are actual and reasonable.

Several commenters requested the Department require the State to provide annual audits, prove actual and reasonable expenses, and periodically negotiate regulatory costs. One commenter requested the Department add the phrase "and reasonable" to the last sentence in

§ 293.19. Another commenter requested the Department add the phrase "or refuses to provide such records" to the last sentence in § 293.19.

The Department has accepted these suggested edits in part and has revised § 293.19, to reflect these comments.

Several commenters requested the Department clarify how the department distinguishes between assessed regulatory costs and a prohibited tax, fee, charge, or other assessment.

The Department acknowledges the comments. Section 293.25 includes a discussion of the Department's interpretation of IGRA's prohibition against the imposition of a tax, fee, charge, or other assessment. IGRA provides a compact may include provisions relating to "the assessment by the State of [the Tribe's class III gaming activity] in such amounts as are necessary to defray the costs of regulating [the Tribe's class III gaming activity]." 25 U.S.C. 2710(d)(3)(C)(iii). IGRA in section 2710(d)(4) then prohibits the State from imposing a tax, fee, charge, or other assessment except for any assessments that may be agreed to under paragraph (3)(C)(iii). The Department reads IGRA's provision permitting the State to assess regulatory costs narrowly and inherently limited to the negotiated allocation of regulatory jurisdiction. Section 293.25 includes a discussion of the Department's interpretation of IGRA's prohibition against the imposition of a tax, fee, charge, or other assessment.

Comments on § 293.20 May a compact or amendment include provisions addressing the Tribe's taxation of gaming?

Several commenters expressed support for the proposed § 293.20, and noted clear guidelines are beneficial to all parties by reducing the risk that improper provisions will be included. Commenters expressed support for the inclusion of a bad faith standard in the proposed § 293.20. Several commenters requested the Department add the word "presumptive" so the relevant sentence would read "[t]he inclusion of provisions addressing the Tribe's taxation of other activities is considered presumptive evidence of bad faith."

The Department acknowledges the comments but declines to add the word "presumptive." As explained above the Department has replaced the phrase "evidence of bad faith" with "evidence of a violation of IGRA."

Several commenters expressed opposition for the proposed § 293.20. Commenters raised concerns that the proposed text appears to allow States to tax gaming revenue. Other commenters noted this may cause States to demand specific forms of Tribal taxation of Tribal gaming and argues the provision is unnecessary.

The Department acknowledges the comment, but notes IGRA provides a compact may address Tribal taxation of Tribal gaming in amounts comparable to State taxation of State gaming. 25 U.S.C. 2710(d)(3)(C)(iv). The Department has revised § 293.20 to clarify this provision.

Comments on § 293.21 May a compact or amendment include provisions addressing remedies for breach of the compact?

Several commenters expressed support for the proposed § 293.21 and the inclusion of a bad faith standard. Several commenters discussed their experiences with States seeking to enforce dispute resolution agreements or decisions that violated IGRA.

The Department acknowledges the comments. As explained above, the Department has replaced the phrase "evidence of bad faith" with "evidence of a violation of IGRA."

Several commenters questioned the Secretary's authority to review dispute resolution agreements, arbitration awards, settlement agreements, or other resolutions of a dispute outside of Federal court.

The Department acknowledges the comments. The Secretary has authority to promulgate these regulations based on the statutory delegation of powers contained in IGRA and 25 U.S.C. 2, and 9 to review compacts and amendments. The Department is aware of arbitration awards, settlement agreements, and other similar dispute resolution agreements which have amended the terms of a compact. IGRA requires the Secretary to review compacts and publish

notice in the *Federal Register* before a compact is in effect and the Department has made conforming edits to § 293.4.

Several commenters expressed concern with the proposed § 293.21. Commenters stated the documents sought under the provision was overly broad. Other commenters suggested the proposed § 293.21 would encourage parties to seek dispute resolution in Federal court and discourage parties from seeking more cost effective and faster resolution of disputes because of the risk the Secretary may reject the agreement. Commenters noted settlement agreements are often confidential. One commenter requested clarification why the Department is interested in reviewing dispute resolution agreements and arbitration awards. Another commenter cautioned the Department's review of these provisions may prevent Tribes from exercising self-determination and sovereignty in compact negotiations.

The Department acknowledges the comments. The Department seeks to ensure all compacts, amendments, and dispute resolution agreements or awards are consistent with IGRA and are properly in effect. The Department has made conforming edits to §§ 293.2, 293.4, 293.7, and 293.21 to address concerns raised regarding secretarial review of compact amendments arising out of dispute resolution. The Department encourages parties to resolve compact disputes in a timely, cost-effective manner, which is consistent with IGRA.

Several commenters requested the Department revise the proposed § 293.21 by amending the title and adding text to § 293.21. The proposed title would read: "[m]ay a compact or amendment include provisions addressing the resolution of disputes for breach of the compact?"

The Department has accepted the proposed revisions in part. As explained above, the Department has replaced the phrase "evidence of bad faith" with "evidence of a violation of IGRA."

Several commenters requested the Department clarify if compacts should include dispute resolution options other than termination of a compact, which only harms the Tribe.

The Department acknowledges the comments. The Department notes that compacts are carefully negotiated long-term agreements between sovereigns. IGRA provides compacts may include "remedies for breach of contract." The Department notes well drafted compacts include options for the parties to continue operating under the compact, while seeking to resolve any disputes arising from the compact. If the compact includes payments to the State for regulatory costs as described in proposed § 293.19, or revenue sharing as described in § 293.25, the Department recommends including provisions which permit the Tribe to divert disputed funds into an escrow account.

One commenter requested the Department include a grandfather clause for established settlement agreements to protect the settled expectations of parties to existing agreements. The commenter explained a party may seek to relitigate a settled dispute by arguing the agreement is not valid.

The Department declines to include a grandfather clause for settlement agreements which have not been submitted for Secretarial review and publication of a notice in the *Federal Register*. The Department has included revisions to the proposed § 293.21 as well as § 293.4 to clarify and limit the scope of this review. The Department encourages parties to seek § 293.4 review if the parties are concerned their settlement agreement is an 'amendment.'

Comments on § 293.22 May a compact or amendment include provisions addressing standards for the operation of gaming activity and maintenance of the gaming facility?

A number of commenters expressed support for the proposed § 293.22 and requested the Department strengthen the provision by defining what qualifies as "maintenance" in greater detail. Commenters explained some States seek expansive regulatory standards that are not related to the maintenance of a facility. Other commenters noted State's may seek to require a Tribe to adopt State law equivalent ordinances and requested the Department add the following sentence to § 293.22, "[i] f a compact or amendment mandates that the Tribe adopt standards equivalent or comparable to the standards set forth in a State law or regulation, the parties must

show that these mandated Tribal standards are both directly related to and necessary for, the licensing and regulation of the gaming activity."

The Department acknowledges the comments and has revised § 293.22 by including the requested sentence.

Comments on § 293.23 – which has been renumbered as 293.24 – What factors will be used to determine whether provisions in a compact or amendment are directly related to the operation of gaming activities?

The Department has renumbered the proposed § 293.23 as § 293.24 comments have been edited to reflect the new section number.

Several commenters expressed support for the proposed § 293.24. Commenters explained the provision would improve compact negotiations by providing parties with clear guidance on which topics are consistent with IGRA and which topics are outside of IGRA's narrow scope of compact terms under 25 U.S.C. 2710(d)(3)(C). Commenters noted the proposed § 293.24 is consistent with the Departments long standing requirement of a direct connection and repudiation of some States' application of a "but for" test.

The Department acknowledges the comments.

One commenter expressed concern that the Department was inadvertently creating additional tests including a "incidental benefit" test in § 293.24.(b) and a "not directly related" test in § 293.24(b) and (c) as well as an "unrelated to" test in § 293.24(c)(4).

The Department acknowledges the comments. The Department has revised § 293.24(b) and (c)(4) for consistency and notes the phrase "not directly related" as used in § 293.24 as the inverse of the phrase "directly related."

One commenter recommended the Department include a section immediately preceding proposed § 293.24 mirroring the question-and-answer format of the proceeding sections in Subpart D. The section would be titled "[m]ay a compact or amendment include provisions that are not directly related to the operation of gaming activities?" With a firm declaration that

provisions which are not directly related to the operation of gaming activities is a violation of IGRA.

The Department has incorporated the recommended section with modifications for consistency with the proceeding section in Subpart D. The new section is numbered § 293.23 and the following sections have been renumbered.

Several commenters recommended the Department revise § 293.24 by inserting the word "activity" or "activities" after the phrase "class III gaming" for consistency with other sections in part 293.

The Department has added the word "activity" or "activities" as appropriate in § 293.24.

Several commenters requested the Department provide a table of authority for provisions considered "directly related to the operation of gaming activities" under § 293.24(a) as well as provisions considered "not directly related to the operation of gaming activities" under § 293.24(c). Commenters recommended the Department revise or remove provisions which were not supported by past decisions issued by the Department and/or case law.

The Department has prepared a table of authorities addressing these and other provisions.

Several commenters recommended the Department provide standards and/or a procedure within the regulatory text outlining how the parties are expected to comply with the requirement in § 293.24(a) to "show that [provisions included in the compact or amendment] are directly connected to the Tribe's conduct of class III gaming." Commenters also recommended the Department include in the part 293 regulations deference to a reasonable Tribal determination that a provision is directly connected to the Tribe's conduct of class III gaming.

The Department declines to provide a specific procedure for complying with § 293.24 in order to provide the parties with the necessary flexibility to address the specific terms of their agreement. Some parties chose to provide a justification brief explaining key or novel provisions to the Department as part of their compact or amendment submission. When necessary, the Department's practice is to request additional information from the parties regarding specific

provisions in the compact or amendment. Additionally, the Department frequently provides technical assistance to parties negotiating a compact or amendment by flagging provisions which may violate IGRA or may require additional justification. A best practice for compacts requiring State legislative approval is to seek technical assistance before the compact is formally adopted by legislative action.

A number of commenters responded to the Department's third consultation question "[s]hould the draft revisions include provisions that facilitate or prohibit the enforcement of State court orders related to employee wage garnishment or patron winnings?" Commenters encouraged the Department to include provisions which prohibit Tribal enforcement of State court orders related to employee wage garnishment and/or patron winnings in compacts. The commenters explained that these provisions are not directly related to operation of gaming activities under 25 U.S.C. 2710(d)(3)(C)(vii). Further some commenters explained they have prevailed in litigation arguing that State court wage garnishment orders are not binding on the Tribe or the Tribe's employees. Commenters noted that while comity agreements between sovereigns may be mutually beneficial, compact negotiations should not be used to force Tribes to enforce these provisions. Commenters also explained without a Tribal law mechanism for domesticating a State court order, enforcing such an order erodes Tribal sovereignty and exposes the Tribe and the Tribal gaming operation to unwarranted liability.

The Department has added enforcement of State court orders to the list of provisions which are not directly related to the operational gaming activities in § 293.24(c). The Department notes this is consistent with the 9th Circuit decision in *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024 (9th Cir. 2022).

Several commenters requested the Department include in the § 293.24(c) list of provisions which are not directly related to the operation of gaming activities provisions which require the Tribe to negotiate memorandum of understanding or intergovernmental agreements with local governments.

The Department has added requiring memorandum of understanding or intergovernmental agreements with local governments to the list of provisions which are not directly related to the operational gaming activities in § 293.24(c). The Department notes this is consistent with the 9th Circuit decision in *Chicken Ranch Ranchera of Me-Wuk Indians v. California*, 42 F. 4th 1024 (9th Cir. 2022).

Several commenters requested the Department include in the § 293.24(c) list of provisions, which are not directly related to the operation of gaming activities, provisions which require the Tribe to submit to State court jurisdiction over tort claims arising from the Tribe's conduct of class III gaming activities.

The Department has added requiring State court jurisdiction over tort claims arising from the Tribe's conduct of class III gaming activities to the list of provisions which are not directly related to the operational gaming activities in § 293.24(c). The Department notes this is consistent with the District of New Mexico's decision in *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254 (D.N.M 2013).

Several commenters requested the Department include an additional paragraph to § 293.24 codifying the Department's practice of providing technical assistance letters to negotiating parties regarding whether a proposed compact provision is 'directly related' to the Tribe's operation of gaming activities consistent with IGRA. Commenters requested the Department further include avenues for parties to obtain assistance from the Department in seeking guidance letters or legal opinions from the National Indian Gaming Commission and the United States Department of Justice.

The Department declines to adopt a formal codification of its practice providing technical assistance to Tribes and States. The Department will continue to coordinate with the Department of Justice and the National Indian Gaming Commission regarding enforcement of IGRA.

Comments on § 293.24(a)

Several commenters objected to the Department's inclusion of provisions in § 293.24(a) addressing patron conduct within the gaming facility as "directly related to the Tribe's conduct of gaming." Commenters argued the examples provided – without further clarification or supporting past precedent and or case law – may cause confusion and invite State overreach. Other commenters noted the examples provided of subjects regulating patron conduct included subjects which resulted in contentious negotiations with their respective States, including State attempts to ban alcohol and smoking in Tribal facilities while requiring State licensed facilities serve alcohol. Other commenters recommended the Department revise the list of examples in § 293.24(a) to reflect non-controversial subjects that are "directly related to the Tribe's conduct of gaming" including minimum age restrictions and the transportation of gaming devices and equipment.

The Department acknowledges the comments. The Department has provided a comprehensive table of authorities supporting the examples included in § 293.24(a). The Department has also revised the list to reflect non-controversial subjects the Department has found to be "directly related to the Tribe's conduct of gaming." We note the inclusion of an item in the Department's "directly related" list in § 293.24(a) does not suggest a State may insist on any requirement addressing a "directly related" item.[6]

Several commenters recommended stylistic edits to § 293.24(a) for consistency with § 293.24(c).

The Department has revised § 293.24 for consistency.

One commenter noted the reference to patron conduct in § 293.24(a) could include illegal patron conduct including trafficking in the gaming facility and adjacent non-gaming amenities. The commenter requested the Department's view on provisions which address criminal jurisdiction.

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[6] *See, e.g.*, *Chicken Ranch Ranchera of Me-Wuk Indians v. California*, 42 F.4th 1024, 1063 (9th Cir. 2022).

The Department acknowledges the comment. The phrase "patron conduct" has been removed from § 293.24(a). Further, criminal jurisdiction is addressed in § 293.17.

Comments on § 293.24(b)

Several commenters questioned the Department's inclusion of Tribal infrastructure projects in § 293.24(b) and noted provisions addressing those projects may be beneficial to Tribes.

The Department acknowledges the comments. The Department notes that infrastructure projects may be beneficial for Tribes. The Department included Tribal infrastructure in § 293.24(b) to highlight that these projects should not be "considered directly related to the Tribe's conduct of gaming" simply because they may be funded using gaming revenue or may provide a benefit to the gaming facility.

Several commenters requested the Department remove the word "incidental" from § 293.24(b). Commenters noted the phrase "incidental benefits" may cause confusion and result in unintended State overreach.

The Department has removed the word "incidental" from § 293.24(b).

Comments on § 293.24(c)

One commenter requested the Department revise § 293.24(c) to state "Provisions which the Department may consider not directly related to the operation of gaming activities includes …"

The Department declines to adopt the requested revision.

Several commenters raised concerns with the Department's interpretation in § 293.24(c)(1) that "[l]imiting third party Tribes' rights to conduct gaming" is not directly related to operation of gaming activities under 25 U.S.C. 2710(d)(3)(C)(vii). Several commenters requested clarification and noted the Department has approached compact provisions impacting third party Tribes differently and cited to the Department's discussion and approval of "section 9" in the 1993 Michigan compacts. Other commenters noted that § 293.24(c)(1) could include

Tribal parity provisions or 'most favored nation' provisions. Other commenters recommended the Department remove this provision arguing it is ambiguous and potentially limits geographic exclusivity provisions. Other commenters applauded § 293.24(c)(1) and noted it appeared consistent with the Departments long standing objection to compact provisions which sought to limit third party Tribes' rights under IGRA.

The Department acknowledges the comments. The Department has consistently distinguished compacts with Statewide gaming market regulatory scheme from compacts which limit third party Tribes rights under IGRA. In both Michigan and Arizona, the States and the Tribes negotiated mutually beneficial agreements addressing the location and size of Tribal gaming as part of a Statewide scheme. These and similar compacts included Tribe-to-Tribe revenue sharing provisions to offset market disparities between urban and rural Tribes. These compacts are identical across the State or contain identical relevant provisions. The Department has consistently found these types of agreements consistent with IGRA.[7]

These are contrasted by compacts which act to prevent a Tribe, who is not party to the compact or the broader Statewide scheme, from exercising its full rights to conduct gaming under IGRA, most notably in the form of geographic exclusivity from Tribal competition. The Department has consistently expressed concern with these types of arrangements, and in some cases disapproved compacts containing such provisions.[8] The Department has not limited this

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[7] *See, e.g.*, Letter from Ada Deer, Assistant Secretary – Indian Affairs to Jeff Parker, Chairperson, Bay Mills Indian Community dated November 19, 1993, approving the 1993 Michigan Compact; Letter from Bryan Newland, Principal Deputy Assistant Secretary – Indian Affairs, to Robert Miguel, Chairman Ak-Chin Indian Community, dated May 21, 2021, at 2, discussing the Tribe-to-Tribe revenue sharing and gaming device leasing provisions.

[8] *See, e.g.*, Letter from Gale Norton, Secretary of the Interior, to Cyrus Schindler, Nation President, Seneca Nation of Indians dated November 12, 2002, discussing the limits placed on Tonawanda Band and the Tuscarora Nation in the Seneca Nation's exclusivity provisions, and describing such provisions as "anathema to the basic notion of fairness in competition and … inconsistent with the goals of IGRA"; Letter from Aurene Martin, Assistant Secretary – Indian Affairs (acting), to Harold "Gus" Frank, Chairman, Forest County Potawatomi Community, dated April 25, 2003, addressing the parties removal of section XXXI.B which created a 50 mile 'no fly zone' around the Tribe's Menominee Valley facility and explained "we find a provision excluding other Indian gaming anathema to basic notions of fairness in competition and inconsistent with the goals of IGRA"; Letter from Aurene Martin, Assistant Secretary – Indian Affairs (acting), to Troy Swallow, President, Ho-Chunk Nation, dated August 15, 2003, addressing section XXVII(b), limiting the Governor's ability to concur in a two-part Secretarial Determination under

provision to "anti-compete" or "geographic exclusivity from Tribal competition" to permit the Secretary flexibility in evaluating other provisions which may also improperly limit a third-party Tribe's rights under IGRA.

Commenters recommended the Department include examples of "non-gaming Tribal economic activities" to clarify the Department's standard articulated in § 293.24(b).

The Department has included examples of non-gaming Tribal economic development in § 293.24(c)(8).

Comments on § 293.24 – which has been renumbered as § 293.25 – What factors will the Secretary analyze to determine if revenue sharing is lawful?

The Department has renumbered the proposed § 293.24 as § 293.25 and comments have been edited to reflect the new section number.

A number of commenters responded to the Department's fifth consultation question: "[s]hould the draft revisions include provisions that identify types of meaningful concessions that a Tribe may request from State, other than protection from State-licensed commercial gaming (i.e., exclusivity), for which a Tribe could make revenue-sharing payments? How would such provisions affect compact negotiations?" Many commenters expressed support for including an illustrative list of potential concessions similar to the lists in § 293.24. Commenters noted such a list would aid negotiating parties in identifying types of concessions a State may offer in exchange for revenue sharing. Commenters suggested examples could include: geographic exclusivity, Statewide mobile sports wagering, and a Governor's concurrence in a Secretarial Two-Part Determination under section 2719(b)(1)(A). Other commenters opposed including an illustrative list of potential concessions similar to the lists in § 293.24. Those commenters noted

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section 20(b)(1)(A) of IGRA for another Tribe as "repugnant to the spirit of IGRA"; Letter from Kevin Washburn, Assistant Secretary – Indian Affairs, to Harold Frank, Chairman, Forest County Potawatomi Community dated January 9, 2013, disapproving an amendment which would have made the Menominee Tribe guarantee Potawatomi's Menominee Valley facility profits as a condition of the Governor's concurrence for Menominee's Kenosha two-part Secretarial Determination, *affirmed by Forest Cty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269 (D.D.C. 2018). *See also* Letter from Bryan Newland, Assistant Secretary – Indian Affairs to Claudia Gonzales, Chairwoman, Picayune Rancheria of Chukchansi Indian of California, dated November 5, 2021, at 13.

States may improperly use such a list to demand revenue sharing while offering a concession of limited value to the Tribe. Commenters recommended the Department follow a case-by-case evaluation which provides negotiating parties flexibility.

The Department acknowledges the comments and notes these comments highlight the sensitive nature of revenue sharing in compacts. The Department declines to include a list of meaningful concessions as both the concession and the revenue sharing rate must be evaluated on a case-by-case basis. The Department has approved revenue sharing in exchange for meaningful concessions including geographic exclusivity from State-licensed gaming and Statewide mobile or i-gaming exclusivity.[9] The Department cautions parties not to negotiate for a future meaningful concession which may require intervening Federal or State actions as that concession may be considered illusory.

A number of commenters expressed support for the proposed § 293.25. Commenters noted the proposed § 293.25 appeared to codify existing case law as well as the Department's articulation of the test for determining if revenue sharing is appropriately bargained for exchange or an improper tax. Commenters noted that some States seek to require – or heavily incentivize – intergovernmental agreements with political subdivisions of the State, such as a local government, requiring payments by the Tribe as a disguised tax. Commenters noted this will assist parties in compact negotiations by clearly articulating the Department's test for evaluating revenue sharing. Several commenters recommended the Department review revenue sharing provisions in compacts on a case-by-case basis with deference to a Tribe's sophisticated negotiations and cautioning against a paternalistic review.

The Department acknowledges the comments and notes the proposed § 293.25 codifies the Department's longstanding test for evaluating revenue sharing. The Department included

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[9] *See, e.g.*, Letter from Bryan Newland, Assistant Secretary – Indian Affairs to the Honorable R. James Gessner, Jr., Chairman, Mohegan Tribe of Indians dated September 10, 2021, approving the Tribe's compact amendment with the State of Connecticut; and Letter from Bryan Newland, Assistant Secretary – Indian Affairs to the Honorable Rodney Butler, Chairman, Mashantucket Pequot Indian Tribe dated September 10, 2021, approving the Tribe's amendment to its Secretarial Procedures, as amended in agreement with the State of Connecticut.

payments to local governments in §§ 293.4, 293.8, 293.25, and 293.28, in an effort to address mandated intergovernmental agreements which may disguise improper taxes.

Several commenters requested the Department define "meaningful concession" and "substantial economic benefit." Commenters proposed the Department define meaningful concession as: (1) something of value to the Tribe; (2) related to gaming; (3) which carries out the purposes for which the IGRA was enacted, and (4) which is not a proper subject of negotiation that the State already has an obligation to negotiate with the Tribe under IGRA.

The Department accepted this comment. A new definition for "meaningful concession" is adopted in § 293.2, which reads as follows: a "meaningful concession" is: (1) something of value to the Tribe; (2) directly related to gaming; (3) something that carries out the purposes of IGRA, and (4) not a subject over which a State is otherwise obligated to negotiate under the IGRA.

A new definition for "substantial economic benefits" is adopted in § 293.2, which reads as follows: "substantial economic benefits" is: "(1) a beneficial impact to the Tribe, (2) resulting from a meaningful concession, (3) made with a Tribe's economic circumstances in mind, (4) spans the life of the compact, and (5) demonstrated by an economic / market analysis or other similar documentation submitted by a Tribe or a State."

Several commenters requested the Department include a requirement within §§ 293.8 and 293.25 for the compacting Tribe to submit a market analysis to demonstrate that any revenue sharing arrangements will provide actual benefits to the Tribe which justify the payment amount.

The Department acknowledges the comments. The Department has added the requested requirement to §§ 293.8 and 293.25. Section 293.8(e) is amended to require a Tribe or a State to submit a market analysis along with their compact when the compact contains revenue sharing provisions. Additionally, § 293.25(b)(2) is amended to include "the value of the specific meaningful concessions offered by the State provides substantial economic benefits to the Tribe in a manner justifying the revenue sharing required by the compact."

Several commenters requested the Department include IGRA's primary beneficiary test to the Department's revenue sharing analysis.

The Department acknowledges the comments. The Department has added the requested requirement to § 293.25 as a new § 293.25(b)(3), which now requires evidence showing that the Tribe is the primary beneficiary of its conduct of gaming, if the parties adopt revenue sharing.

A number of commenters described their varying experiences under differing revenue sharing arrangements. Some noted revenue sharing has become a necessary negotiation tactic to bring a reluctant State to the negotiation table after the Supreme Court's decision in *Seminole*. Some commenters discussed revenue sharing with local governments through intergovernmental agreements. Others noted that some particularly high revenue sharing rates based on gross revenue have resulted in the State receiving more revenue than the Tribe's portion of the net revenue. Commenters also discussed situations when States have either actively sought to undermine the Tribe's exclusivity – while not technically violating the compact – or refusing to enforce State law to protect the Tribe's exclusivity.

The Department acknowledges these comments. The Department has long expressed concern with relatively high revenue sharing arrangements, often permitting compacts containing them to go into effect and occasionally disapproving them. The Department's understanding of revenue sharing provisions, as well as exclusivity provisions, has evolved consistent with case law and experiences of Tribes operating under differing revenue sharing provisions for more than 30 years. The Department has long offered, and will continue to offer, technical assistance – highlighting the Department's precedents as well as observed best practices – to parties negotiating revenue sharing provisions.

A number of commenters questioned the Secretary's authority to review revenue sharing with "great scrutiny" or include a bad faith standard to evaluations of revenue sharing provisions. One commenter opined revenue sharing payments are an improper workaround for IGRA's prohibition on the assessment of a tax, fee, charge, or other assessment. Other commenters

expressed concern with the proposed § 293.25 and cautioned the proposed provisions may cause unintended consequences including limiting a Tribe's options to contribute reasonable revenue share to a State to protect exclusivity or redistribute funds to non-gaming Tribes. One commenter opined the Department's past precedents on revenue sharing and exclusivity is suspect, citing the Department's decisions in New Mexico and New York and questioning the value of the exclusivity over the lives of those compacts.

The Department acknowledges the comments. The proposed regulations codify the Department's longstanding test for determining when revenue sharing in a compact is a prohibited "tax, fee, charge, or other assessment" because it goes beyond what is permitted by guidance in relevant court decisions. The Department notes that its evaluation of revenue sharing has evolved to incorporate changes in case law including *Rincon v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010). The Department finds persuasive, but not binding, the language in *Rincon* where the Ninth Circuit explained that IGRA requires courts to consider a State's demand for taxation as *evidence* of bad faith, not conclusive proof (citing *In re Indian Gaming Related* Cases (*Coyote Valley II*), 331 F.3d 1094, 1112-13 (9th Cir. 2003), which in turn cited section 2710(d)(7)(B)(iii)(II)). The Department's great scrutiny standard is consistent with IGRA's prohibition on a State demanding a tax, fee, charge, or other assessment under section 2710(d)(4) and IGRA's instruction to the courts in section 2710(d)(7)(B)(iii)(II). The Department notes the Secretary expressed concerns with the exclusivity provisions in both the 2015 New Mexico deemed approval letters and the 2002 Seneca Nation deemed approval letter but deferred to the judgment of the Tribes.[10] As explained above, the Department has replaced the phrase "evidence of bad faith" with "evidence of a violation of IGRA."

[10] *See* Letter from Gale Norton, Secretary of the Interior, to Cyrus Schindler, Nation President, Seneca Nation of Indians dated November 12, 2002; *see also* Letter from Kevin Washburn, Assistant Secretary – Indian Affairs, to Ty Vicenti, President, Jicarilla Apache Nation, dated June 9, 2015.

Several commenters suggest the Department expand the bad faith standard in § 293.24(c). Some commenters requested the Department include a State's continued insistence that the Tribe accept the proposed "meaningful concession" in exchange for revenue sharing as evidence of bad faith. Commenters opined that the provision is consistent with the Ninth Circuit's analysis of the issue in *Rincon Band v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010). Other commenters requested the Department include a State's request for revenue sharing, or insistence on a specified rate paid by other Tribes, either in the State or in a neighboring State, or past rates that are no longer supported by the current market, as presumptive evidence of bad faith. Other commenters requested the Department include a State's disparate treatment of similarly situated Tribes in the State as presumptive evidence of bad faith.

The Department declines to include additional examples as bad faith or adopt a "presumptive bad faith" standard. As explained above, the Department has replaced the phrase "evidence of bad faith" with "evidence of a violation of IGRA." The compact negotiation process in IGRA envisions a negotiation between two sovereigns, although the Department notes in some instances Tribes have successfully engaged in collective negotiations with the State. If a State makes an offer which the Tribe rejects, the Tribe may make a counteroffer. The IGRA provides that if a State does not negotiate, or does not negotiate in good faith, the remedial provisions of the statute permit a Tribe to bring an action in Federal district court. The Department will continue to coordinate with the Department of Justice and the National Indian Gaming Commission regarding enforcement of IGRA.

Some commenters requested the Department revise § 293.25 to require the Tribe to initiate revenue sharing negotiations and to tie the revenue sharing provision's specific payments to specific concessions. The proposed revised text would read: "(1) the Tribe requested and the State has offered specific meaningful concessions the State was otherwise not required to negotiate; and (2) the value of the specific meaningful concessions offered by the State provides

substantial economic benefits to the Tribe in a manner justifying the revenue sharing required by the compact."

The Department accepts the requested revision as § 293.25(b)(1) and (2).

> One commenter requested the Department include a provision in § 293.25 permitting the Tribe, during the life of the compact, to request technical assistance or a legal opinion if the meaningful concession continues to provide substantial economic benefits to the Tribe justifying continued revenue sharing payments and, if not, to what extent the revenue sharing payments should be adjusted to remain in compliance with IGRA.

The Department declines to adopt the requested provision in § 293.25. The Department will continue to offer technical assistance to Tribes and States, including identification of best practices. The Department notes best practices include careful drafting of both the terms of the Tribe's exclusivity – or other meaningful concession – along with remedies for breach and triggers for periodic renegotiation of specific provisions.

Several commenters requested the Department clarify that a State's obligation under IGRA to negotiate a compact is not a "meaningful concession" for the purposes of revenue sharing.

The Department acknowledges the comments. Congress required Tribes and States to negotiate class III gaming compacts in good faith, provided a remedy if States refused to negotiate in good faith, limited the scope of bargaining for class III gaming compacts, and prohibited States from using the process to impose any tax, fee, charge or other assessment on Tribal gaming operations. 25 U.S.C. 2710(d).

Several commenters noted the proposed § 293.25, while helpful for most Tribes and States, is without a *Seminole* fix effectively a dead letter.

The Department has addressed comments requesting a *Seminole* fix above under general comments. There the Department notes it has long coordinated with the Department of Justice and the National Indian Gaming Commission regarding enforcement of IGRA.

Several commenters requested the Department clarify that the result of a "bad faith" determination under § 293.25 would result in automatic disapproval of the compact or amendment.

The Department declines to establish an automatic disapproval standard. As explained above, the Department has replaced the phrase "evidence of bad faith" with "evidence of a violation of IGRA." The Secretary's discretion to disapprove or take no action is discussed under §§ 293.12, 293.15, and 293.16.

One commenter noted that the proposed regulation at § 293.25, when read in conjunction with § 293.24, is ambiguous and needs to be clarified. The two proposed regulations, taken together, seem to imply that the "meaningful concession exception" is limited to a State's demand for a fee.

The Department acknowledges the comments. The Department notes § 293.24 addresses provisions which are considered "directly related to gaming" while § 293.25 addresses revenue sharing. The Department also notes the recent decision by the Ninth Circuit in *Chicken Ranch* overturned the district court's application of the meaningful concession test to provisions which were tangentially related to gaming. The Department finds the Ninth Circuit's reasoning persuasive, but not binding, that meaningful concessions cannot make an out-of-scope topic proper under IGRA. *Chicken Ranch Ranchera of Me-Wuk Indians v. California*, 42 F.4th 1024 (9th Cir. 2022)

Comments on § 293.25 – which has been renumbered as § 293.26 – May a compact or extension include provisions that limit the duration of the compact?

The Department has renumbered the proposed § 293.25 as § 293.26 comments have been edited to reflect the new section number.

Several commenters expressed support for the proposed § 293.26 and explained compacts should be very long term or perpetual. Commenters noted the negotiation process can be lengthy and require a significant investment of resources.

The Department acknowledges the comments.

Several commenters expressed support for the inclusion of a bad faith standard in the proposed § 293.26. Several commenters requested the Department add the word "presumptive" so the relevant sentence would read "[a] refusal to negotiate a long-term compact, or a short-term extension to allow for negotiations to continue, is considered presumptive evidence of bad faith."

The Department acknowledges the comments but declines the requested revision. As explained above the Department has replaced the phrase "evidence of bad faith" with "evidence of a violation of IGRA."

One commenter requested the Department define "long-term" as at least 15-years, and "short-term" as at least one year.

The Department declines the proposed definition of "at least 15-years" for long term but has accepted the proposed definition of "at least 1 year" for short term.

Several commenters requested the Department clarify that the existence of a compact with a Tribe does not negate a State's obligation to negotiate a new compact or an amended compact for the period after the current compact expires.

The Department acknowledges the comments. The Department notes IGRA at 25 U.S.C. 2710(d)(3)(A) obligates a State to negotiate with a Tribe in good faith at the request of the Tribe. The existence of a compact does not absolve the State of its duty under IGRA.

Comments on § 293.26 – which has been renumbered as 293.27 – May a compact or amendment permit a Tribe to engage in any form of class III gaming activity?

The Department has renumbered the proposed § 293.26 as 293.27 comments have been edited to reflect the new section number.

Several commenters expressed their support for this provision, noting that it will assist Tribes in negotiating scope of gaming provisions.

The Department acknowledges the comments.

A few commenters, while expressing support for the provision, stated that the provision was unclear as to its intent, and requested that the Department clarify that "any" means "all." One commenter suggested the Department modify the second sentence to clarify the intent of the provision as follows: "A State's refusal to negotiate a compact over all forms of class III gaming if it allows any form of class III gaming, is considered evidence of bad faith." While one commenter suggested the Department revise the second sentence to remove "not prohibited by the State."

The Department acknowledges the comments but declines the requested revisions. As explained above, the Department has replaced the phrase "evidence of bad faith" with "evidence of a violation of IGRA." The language used by the Department follows the authority granted by IGRA.

One commenter noted that the term "not prohibited" has been the subject of much debate, interpretation, and litigation since IGRA was enacted and that a State, although its laws may prohibit such gaming, the State allows it to occur through non-enforcement. The commenter suggested that the Department revise the provision to make it clear that the mere existence of laws which state that class III gaming or a form of class III gaming is prohibited alone are not determinative of whether a State in fact prohibits class III gaming or a form of class III gaming, and that the Department will also examine the State's policies and practices regarding enforcement of laws that purport to prohibit class III gaming or a form of class III gaming in determining whether a State in fact prohibits such gaming.

The Department acknowledges the comment but declines the requested revision. The language used by the Department follows the authority granted by IGRA.

Many commenters, while expressing support for the provision, noted that courts have disagreed with this approach, particularly the Tenth Circuit, Ninth Circuit, and Eighth Circuit, where those courts adopted a narrower interpretation of the term "permits such gaming," adopting the view that the phrase "such gaming" refers to specific types of class III games that a State permits. These commenters expressed concern that the provision is thus inconsistent with these more recent Federal court decisions and may lead to unnecessary litigation and cause some confusion and obstruction in future compact negotiations. One commenter questioned the language of § 293.27, noting that there is a body of Federal case law regarding the distinction between "permitted" and "prohibited" gaming activities. The commenter did not believe that § 293.27 adds value to existing case law.

The Department acknowledges these comments. The Department takes the position that the Second Circuit's decision in *Mashantucket Pequot Tribe v. Connecticut*, 913 F. 2d 1-24 (2d Cir. 1990) holding that Congress intended to codify the test set out in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) when it used the phrase "permits such gaming" such that IGRA refers to class III gaming categorically is correct. Under the Secretary's delegated authority to interpret and promulgate rules for IGRA, the Department finds that if a State allows any form of class III gaming, it is regulating all forms of class III gaming, which are a subject for good faith negotiations.

One commenter stated that § 293.27 appears to take a broader approach in scope of class III games and that it was unclear whether as currently drafted if § 293.27 speaks in class III games regulated by the State and not prohibited in the State and how provisions regarding Statewide remote wagering or internet wagering would be addressed under this provision.

The Department acknowledges this comment. § 293.27 provides that if a State allows any form of class III gaming, the State is regulating all forms of class III gaming, which are permitted under IGRA and thus a subject for good faith negotiations. In response to comments

received during consultation the Department has added a new proposed section addressing i-gaming, § 293.29.

Several commenters suggested that a State's refusal to allow all forms of class III gaming as allowed under a State's constitution or other laws should be considered presumptive evidence of bad faith.

The Department acknowledges these comments but declines to make this revision. IGRA does not permit a presumptive determination of bad faith. Additionally, as explained above the Department has replaced the phrase "evidence of bad faith" with "evidence of a violation of IGRA."

Comments on § 293.27 – which has been renumbered as § 293.28 – May any other contract outside of a compact regulate Indian gaming?

The Department has renumbered the proposed § 293.27 as § 293.28 and comments have been edited to reflect the new section number.

Several commenters expressed support for the proposed § 293.28.

The Department acknowledges the comments.

Several commenters expressed concern with proposed § 293.28. Commenters stated that the provisions requiring Tribes to submit all the agreements encompassed under § 293.28 and § 293.4(b) are overly broad and should be revised to ensure they do not impact existing jurisdiction agreements, in lieu tax agreements, mutual aid agreements for law enforcement, health and safety agreements, alcohol regulation agreements, utility agreements, necessary roadway improvements, lending agreements, vendor agreements, and intergovernmental agreements with units of local governments. Commenters assert that the breadth of § 293.28 would create doubt over the validity of many existing jurisdiction agreements, undermine Tribal sovereignty, and interfere with the Tribes' ability to negotiate necessary local agreements according to what the Tribe believes is in its best interest based on its circumstances and experience.

Other commenters stated that the proposed new requirement for the Secretary to approve any "Agreements which include provisions for the payment from a Tribe's gaming revenue …." is unnecessary and will result in the submission of an "exponential" number of agreements to the Office of Indian Gaming causing unnecessary delay and creating new roadblocks to a Tribe's economic development efforts. Moreover, offering a vague declination type remedy, with no time limit on agency action and no deemed approval mechanism will create further unnecessary delay. Further, IGRA at 25 U.S.C. 2710(d)(3) specifies "compacts" that are executed between Tribes and States under Federal and applicable State law, not counties or other political subdivisions of the State.

The Department accepted the comments, in part. Section 293.28 is modified to indicate that only agreements between Tribes and States, or States' political subdivisions, which govern gaming and include payments from gaming revenue, are covered by this section. Agreements that do not regulate gaming need not be submitted to the Department for approval as part of a Tribal-State gaming compact. Likewise, agreements between Tribes and the State and/or local governments that facilitate cooperation and good governance, but that do not regulate gaming, should not be incorporated into or referenced as a requirement of a Tribal-State gaming compact. Additionally, the Department has revised § 293.4(b) to require the Department to issue a determination whether a submitted document is a compact or amendment within 60 days of it being received and date stamped by the Office of Indian Gaming.

Several commenters requested the Department revise § 293.28 to permit rather than require a Tribe to submit the targeted documents and narrow which documents are targeted. Commenters explained the proposed revisions to § 293.28 would ensure that compacts and amendments do not include provisions that are not directly related to the operation of a Tribe's class III gaming operation. Commenters stated Tribes should have the option to request the Department's review and approval of other agreements, mandated or required by a compact or amendment, that do not exceed the scope permitted under IGRA.

The Department accepted the requested revisions. The Department revised § 293.28 to reflect the section only covers agreements between a Tribe and a State or the State's political subdivisions, which regulates the Tribe's right to conduct gaming or includes payments from the Tribe's gaming revenue. The Department has also revised § 293.4 as discussed above. Agreements between a Tribe and the State and/or local governments that facilitate cooperation and good governance, but that do not regulate gaming or include payments from gaming revenue, should not be incorporated into, or referenced as a requirement of, a Tribal-State gaming compact.

Several commenters requested the Department revise proposed § 293.28, to exclude lending/loan agreements. The commenter argued the proposed language in § 293.28 would require Tribes to send lending agreements (loan documents) for Department review and approval under IGRA because it is not uncommon for lending agreements to require a Tribe hold gaming revenue in accounts for collateral or similar purposes. Commenters questioned if the Department intends to review financial documentation and lending agreements between Tribes and third-party lenders, which are subject to the National Indian Gaming Commission's review to determine if the agreement constitutes a management contract. Commenters opined subjecting lending agreements to review by the Department and the National Indian Gaming Commission would be extremely burdensome.

The Department accepted the requested revisions. The Department revised § 293.28 to reflect the section only covers agreements between a Tribe and a State or the State's political subdivisions, which regulates the Tribe's right to conduct gaming or includes payments from the Tribe's gaming revenue. Third-party agreements, such as lending documents and regular course of business agreements need not be submitted to the Department for approval as part of a Tribal-State gaming compact.

Several commenters questioned the Secretary's authority to review all documents included in the proposed § 293.28. Commenters explained section 2710(d)(3) of IGRA specifies

that compacts are executed between Tribes and States under Federal and applicable State law, not counties or other political subdivisions of the State. Commenters explained this provision would arguably require submission of a vast number of agreements between Tribes and State and local governments. Commenters asserted that the use of gaming revenue is governed by 25 U.S.C. 2710(b)(2)(B) and many compacts and gaming ordinances have similar requirements. Commenters argued policing non-compact agreements, which call for payment from gaming revenue, is far afield of the Secretary's limited authority to approve or disapprove a compact.

The Department acknowledges the comments. IGRA directs that the Secretary review and either approve or disapprove compacts within a 45-day review period. In enacting IGRA, Congress delegated authority to the Secretary to review compacts to ensure that they comply with IGRA, other provisions of Federal law that do not relate to jurisdiction over gaming on Indian lands, and the trust obligations of the United States. 25 U.S.C. 2710(d)(8)(B)(i)-(iii). IGRA establishes a limited scope of appropriate topics in a Tribal-State gaming compact. Thus, in reviewing submitted compacts and amendments, the Secretary is vested the authority to determine whether the compacts contain topics outside IGRA's limited scope. IGRA limits a Tribe's use of gaming revenue to: funding Tribal governmental operations or programs; providing for the general welfare of the Tribe and its members; promoting Tribal economic development; donating to charitable organizations; or help fund operations of local governmental agencies. 25 U.S.C. 2710(b)(2)(B). However, IGRA in section 2710(d)(4) prohibits the State or its political subdivisions from imposing a tax, fee, charge, or other assessment. The Department reads section 2710(b)(2)(B) to permit a Tribe to voluntarily help fund operations of local governmental agencies, not as an end-run around the prohibition against imposed taxes, fees, charges, or other assessments in section 2710(d)(4). Section 293.25 includes a discussion of the Department's interpretation of IGRA's prohibition against the imposition of a tax, fee, charge, or other assessment.

Comments on § 293.28 – which has been renumbered as § 293.31 – How does the Paperwork Reduction Act affect this part?

The Department has renumbered the proposed § 293.28 as § 293.31 comments have been edited to reflect the new section number.

Several commenters expressed support for the proposed § 293.31.

The Department acknowledges the comments and notes the proposed § 293.31 is the renumbered but unrevised § 293.16 in the Department's 2008 Regulations.

V. SUMMARY OF CHANGES BY SECTION

The Department proposes to provide primarily technical amendments to the existing process-based regulations, including the title. The proposed technical amendments are intended to clarify the process and contain edits for internal consistency and improved readability. The Department also proposes to add 15 sections addressing substantive issues and organize part 293 into 4 subparts. The Department proposes to amend the title to part 293 by removing the word "process" from the title. The proposed amended title would be "part 293 Class III Tribal State Gaming Compacts." The Proposed Amendments incorporate comments received during Tribal consultation on the Consultation Draft and discussed above in the Tribal Consultation section.

A. Proposed Subpart A – General Provisions and Scope

The Proposed Subpart A, titled "General Provisions and Scope" would contain §§ 293.1 through 293.5.

Proposed Amendments to § 293.1 – What is the Purpose of the part?

The Department proposes technical amendments to clarify that the proposed part 293 Regulations contain both procedural and substantive regulations.

Proposed Amendments to § 293.2 – How are key terms defined in this part?

The Proposed Amendment restructures the existing § 293.2 by removing the paragraph for the introductory sentence and editing that sentence for clarity. The proposed restructuring improves clarity by using the paragraphs for each defined term. The existing definitions for

Amendment, *Compact* or *Tribal-State Gaming Compact*, and *Extension* reflect proposed edits to improve clarity and respond to comments received during consultation. The Proposed Amendments includes seven new definitions: *gaming activity* or *gaming activities*, *gaming facility*, *gaming spaces*, *IGRA*, *meaningful concession*, *substantial economic benefit,* and *Tribe*.

- *Gaming activity* or *gaming activities* are interchangeable terms repeatedly used in IGRA but not defined by IGRA. Therefore, the Department proposes to define these terms as used in part 293 and in Tribal-State gaming compacts as "the conduct of class III gaming involving the three required elements of chance, consideration, and prize."
- *Gaming Facility* is a term used in IGRA at 25 U.S.C. 2710(d)(3)(C)(vi), but is not defined by IGRA. IGRA permits a compact to include "standards for the operation of such activity and maintenance of the gaming facility, including licensing." As a result, compacting parties have on occasion used this provision to extend State regulatory standards beyond the maintenance and licensing of the physical structure where the Tribe is conducting gaming. The definition of *gaming facility* addresses building maintenance and licensing under the second clause of 25 U.S.C. 2710(d)(3)(C)(vi) and is intended to be narrowly applied to only the building or structure where the gaming activity occurs. Therefore, the Department proposes to define *gaming facility* as "the physical building or structure where the gaming activity occurs."[11]
- *Gaming spaces* is a term the Department has used to clarify the physical spaces a compact may regulate. The Department proposed to define *Gaming Spaces* as "the areas within a *Gaming Facility* that are directly related to and necessary for the conduct of class III gaming such as: the casino floor; vault; count room; surveillance, management, and information technology areas; class III gaming device and supplies storage areas; and

[11] *See, e.g.* Letter to the Honorable Peter S. Yucupicio, Chairman, Pascua Yaqui Tribe of Arizona, from the Director, Office of Indian Gaming, dated June 15, 2012, at 5, and fn. 9, discussing the American Recovery & Reinvestment Act of 2009 and the IRS's "safe harbor" language.

other secured areas. where the operation or management of class III gaming takes place, including the casino floor, vault, count, surveillance, management, information technology, class III gaming device, and supplies storage areas."

- *IGRA* is the commonly used acronym for the Indian Gaming Regulatory Act of 1988 (Pub. L. 100-497) 102 Stat. 2467 dated October 17, 1988, (Codified at 25 U.S.C. 2701-2721 (1988)) and any amendments. The Department proposes to include IGRA as a defined term to facilitate consistency and readability in the regulations.
- *Meaningful concession* is a term the Department has adopted from Ninth Circuit caselaw as part of the Department's long-standing test for revenue sharing provisions. The Department proposes to define meaningful concession as: "something of value to the Tribe; directly related to gaming; something that carries out the purposes of IGRA; and not a subject over which a State is otherwise obligated to negotiate under IGRA."
- *Substantial economic benefit* is a term the Department has adopted from Ninth Circuit caselaw as part of the Department's long-standing test for revenue sharing provisions. The Department proposes to define substantial economic benefit as: a beneficial impact to the Tribe; resulting from a meaningful concession; made with a Tribe's economic circumstances in mind; spans the life of the compact; and demonstrated by an economic / market analysis or similar documentation submitted by the Tribe or the State.
- *Tribe* – the Department is proposing to include Tribe as a defined term to facilitate consistency and readability in the regulations.

Proposed Amendments to § 293.3 – What authority does the Secretary have to approve or disapprove compacts and amendments?

The Proposed Amendment contains a conforming edit to existing § 293.3.

Proposed Amendments to § 293.4 – Are compacts and amendments subject to review and approval?

The Proposed Amendments contains clarifying edits combining paragraphs (a) and (b) from the 2008 Regulations into a new paragraph (a); a new paragraph (b) which was proposed during Tribal consolation, and a new paragraph (c) which creates a process by which the Parties may seek a determination if an agreement or other documentation is a "compact or amendment" without submitting that agreement for review and approval pursuant to IGRA. These proposed changes clarify that any document between a Tribe and the State or its political subdivisions which establish, change, or interpret the terms of a Tribe's compact or amendment regardless of whether they are substantive or technical, must be submitted for review and approval by the Secretary. The Department is concerned that compacting parties have read the existing definition of Compact in § 293.2(b)(2) and the existing § 293.4, narrowly to exclude from Secretarial review a range of agreements or other documents which often impact the parties understanding and application of the terms of their compact, or payments made by a Tribe from gaming revenue. The Department is proposing a new paragraph (b) to clarify the scope of documents that may be considered an amendment and a new paragraph (c) to allow parties to seek a determination from the Department that their agreement is or is not a compact. This process is modeled on the National Indian Gaming Commission's practice of issuing declination letters for agreements which do not trigger NIGC's review and approval of management contracts as required by IGRA at 25 U.S.C. 2711.

Proposed Amendments to § 293.5 – Are extensions to compacts subject to review and approval?

The Proposed Amendments contain clarifying edits for consistency and readability. Additionally, the Department is proposing to add a sentence which codifies the Department's long-standing practice that an extension must be published in the *Federal Register* to be in effect.[12]

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[12] *See, e.g*. Notice of Final Rulemaking Part 293, 73 FR 74004, 74007 (Dec. 5, 2008).

B. Proposed Subpart B – Submission of Tribal-State Gaming Compacts

The Proposed Subpart B, titled "Submission of Tribal-State Gaming Compacts" would contain §§ 293.6 through 293.9.

Proposed Amendments to § 293.6 – Who can submit a compact or amendment?

The Proposed Amendments contains conforming edits for consistency to § 293.6.

Proposed Amendments to § 293.7 – When should the Indian Tribe or State submit a compact or amendment for review and approval?

The Proposed Amendments contains conforming edits for consistency to both the heading and the body of § 293.7.

Proposed Amendments to § 293.8 – What documents must be submitted with a compact or amendment?

The Proposed Amendments contains conforming edits for consistency to § 293.8. Additionally, the Department is proposing to renumber the existing paragraphs and add a new paragraph (d). The proposed paragraph (d) would clarify that compact submission package should include any agreements between the Tribe and the State or its political subdivisions which are required by the compact or amendment and either involve payments made by the Tribe from gaming revenue, or restricts or regulates the Tribe's use and enjoyment of its Indian lands, as well as any ancillary agreements, documents, ordinances, or laws required by the compact which the Tribe determines is relevant to the Secretary's review. The Department's review of the compact includes analyzing if the provision(s) requiring ancillary agreements, documents, ordinances, or laws violate IGRA or other Federal law because the underlying agreement includes provisions prohibited by IGRA, and therefore the Secretary may disapprove the compact.

Proposed Amendments to § 293.9 – Where should a compact or amendment be submitted for review and approval?

The Proposed Amendments contains conforming edits for consistency and proposed new sentence to permit electronic submission of compacts. The Office of Indian Gaming will accept and date stamp electronic submissions for the purpose of initiating the 45-day review period. The first copy of a compact or amendment that is received and date stamped initiates the 45-day review period.

C. Proposed Subpart C – Secretarial Review of Tribal-State Gaming Compacts

The Proposed Subpart C, titled "Secretarial Review of Tribal-State Gaming Compacts" would contain §§ 293.10 through 293.16. The Proposed Amendments include renumbering the existing § 293.14 *When may the Secretary disapprove a compact or amendment?* as § 293.16. Renumbering and renaming the existing § 293.15 *When does an approved or considered-to-have-been-approved compact or amendment take effect?* as § 293.14 *When does a compact or amendment take effect?* And adding a new § 293.15 *Is the Secretary required to disapprove a compact or amendment that violates IGRA?*

Proposed Amendments to § 293.10 – How long will the Secretary take to review a compact or amendment?

The Proposed Amendments contains conforming edits for consistency to § 293.10.

Proposed Amendments to § 293.11 - When will the 45-day timeline begin?

The Proposed Amendments contains conforming edits to § 293.11 for consistency with proposed changes to § 293.9, and a new sentence providing the Department will send an email confirming receipt of electronically submitted compacts or amendments including when the Secretary's 45-day review period ends.

Proposed Amendments to § 293.12 - What happens if the Secretary does not act on the compact or amendment within the 45-day review period?

The Proposed Amendments contain clarifying edits for consistency and readability. Additionally, the Department proposes to include a new provision codifying the Department's practice of issuing letters informing the parties that the compact or amendment has been

approved by operation of law after the 45th day. The letter may include guidance to the parties identifying certain provisions that are inconsistent with the Department's interpretation of IGRA – also known as Deemed Approval Letters.

Proposed Amendments to § 293.13 – Who can withdraw a compact or amendment after it has been received by the Secretary?

The Proposed Amendments contains conforming edits for consistency to § 293.13.

Proposed Amendments to § 293.14 – When does a compact or amendment that is affirmatively approved or approved by operation of law take effect?

The Proposed Amendments renumber the existing § 293.15 as § 293.14 to improve overall organization of the regulations. The Proposed Amendments contain clarifying edits for consistency and readability to both the heading and the body of § 293.14.

Proposed § 293.15 – Is the Secretary required to disapprove a compact or amendment that violates IGRA?

The Proposed Amendments contain a new § 293.15, which clarifies IGRA's limits on the Secretary's authority to review compacts. Congress, through IGRA at 25 U.S.C. 2710 (d)(8), provided the Secretary with time-limited authority to review a compact and discretionary disapproval authority. Within this limited time period, the Secretary may approve or disapprove a compact. IGRA further directs that if the Secretary does not approve or disapprove a compact within IGRA's limited time frame for review, then the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of IGRA. 25 U.S.C. 2710(d)(8)(C). The Department notes that one Circuit has held that the Secretary must disapprove a compact if it violates any of the three limitations in IGRA and may not approve the compact by operation of law. *Amador County v. Salazar*, 640 F.3d 373, 381 (D.C. Cir. 2011). The Department, however, strongly disagrees with the court's holding, finding that it conflicts with and negates a specific provision of IGRA.

Proposed § 293.16 – When may the Secretary disapprove a compact or amendment?

The Proposed Amendments renumber and restructure the existing § 293.14 as § 293.16 to improve overall organization of the regulations. Additionally, the Department proposes to renumber the existing paragraphs and add a new paragraph (b). The proposed paragraph (b) would clarify that if a compact submission package is missing the documents required by § 293.8 and the parties decline to cure the deficiency, the Department will presume that the compact or amendment violates IGRA.

D. Proposed Subpart D – Scope of Tribal-State Gaming Compacts

The Proposed Subpart D, titled "Scope of Tribal-State Gaming Compacts" would contain §§ 293.17 through 293.31. The Proposed Amendments include substantive provisions addressing the appropriate scope of a compact under IGRA. These provisions continue the question-and-answer approach utilized in the existing regulations. These provisions codify existing Departmental practice and provide compacting parties clear guidance on the appropriate scope of compact negotiations.

Proposed § 293.17 – May a compact include provisions addressing the application of the Tribe's or State's criminal and civil laws and regulations?

The Proposed Amendments contains a new § 293.17 clarifying the appropriate scope of terms addressing the application of the criminal and civil laws and regulations in a compact. Congress through IGRA at 25 U.S.C. 2710(d)(3)(C)(i) provided that a compact may include provisions addressing the application of criminal and civil laws and regulations of the Tribe or the State that are directly related to, and necessary for, the licensing and regulation of the gaming activity.

Proposed § 293.18 – May a compact include provisions addressing the allocation of criminal and civil jurisdiction between the State and the Tribe?

The Proposed Amendments contains a new § 293.18 clarifying the appropriate scope of terms addressing the allocation of criminal and civil jurisdiction in a compact. Congress through IGRA at 25 U.S.C. 2701(5) found that "[T]ribes have the exclusive right to regulate gaming

activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." Congress then provided that a compact may include provisions addressing the allocation of criminal and civil jurisdiction between the Tribe and the State necessary for enforcement of the laws and regulations described in section 2710(d)(3)(C)(i). *See* IGRA at 25 U.S.C. 2710(d)(3)(C)(ii).

Proposed § 293.19 – May a compact include provisions addressing the State's costs for regulating gaming activities?

The Proposed Amendments contains a new § 293.19 clarifying the appropriate scope of assessments by the State to defray the costs of regulating the Tribe's gaming activity. Congress through IGRA at 25 U.S.C. 2710(d)(3)(C)(iii) provided that a compact may include provisions relating to the assessment by the State of the gaming activity in amounts necessary to defray the costs of regulating the gaming activity. Congress through IGRA at 25 U.S.C. 2710(d)(4) clarified any assessments must be negotiated and at no point may a State or its political subdivisions impose any taxes, fees, charges, or other assessments upon a Tribe through the compact negotiations. The Proposed Amendments further clarify that the compact should include requirements for the State to show actual and reasonable expenses over the life of the compact and the absence of such provisions is considered evidence of a violation of IGRA.

Proposed § 293.20 – May a compact include provisions addressing the Tribe's taxation of gaming?

The Proposed Amendments contains a new § 293.20 clarifying the appropriate scope of provisions addressing a Tribe's taxation of tribally licensed gaming activity. Congress through IGRA at 25 U.S.C. 2710(d)(3)(C)(iv) provided that a compact may include provisions relating to the Tribe's taxation of gaming activities in amounts comparable to the State's taxation of gambling. A Tribal-State gaming compact may not be used to address the Tribe's taxation of other activities that may occur within or near the Tribe's gaming facility. The inclusion of

provisions addressing the Tribe's taxation of other activities is considered evidence of a violation of IGRA.

Proposed § 293.21 – May a compact or amendment include provisions addressing the resolution of disputes for breach of the compact?

The Proposed Amendments contains a new § 293.21 clarifying the appropriate scope of provisions addressing remedies for breach of the compact. Congress through IGRA at 25 U.S.C. 2710(d)(3)(C)(v) provided that a compact may include provisions relating to remedies for breach of contract. Compacts often include alternative dispute resolution including binding arbitration as part of the parties' remedies for allegations of breach of contract. Despite the Department's existing regulations clarifying that compacts and all amendments are subject to Secretarial review, some compacting parties have resolved disputes in manners which seek to avoid Secretarial review. Therefore, the Department proposes § 293.21 to clarify that any dispute resolution agreement, arbitration award, settlement agreement, or other resolution of a dispute outside of Federal court must be submitted for review and approval by the Secretary. Further, the proposed § 293.21 references the § 293.4 determination process for review prior to formal submission of a dispute resolution agreement as an amendment. The inclusion of provisions addressing dispute resolution in a manner that seeks to avoid the Secretary's review is considered evidence of a violation of IGRA.

Proposed § 293.22 – May a compact or amendment include provisions addressing standards for the operation of gaming activity and maintenance of the gaming facility?

The Proposed Amendments contains a new § 293.22 clarifying the appropriate scope of provisions addressing the Tribe's standards for the operation of the gaming activity as well as the Tribe's standards for the maintenance of the gaming facility, including licensing in a compact. Congress through IGRA at 25 U.S.C. 2710(d)(3)(C)(vi) provided that a compact may include provisions relating to standards for the operation of such activity and maintenance of the gaming facility, including licensing. The Department interprets 2710(d)(3)(C)(vi) narrowly as two

separate clauses addressing separate Tribal and State interests. First, a compact may include provisions addressing the standards for the operation and licensing of the gaming activity. Second, a compact may include provisions addressing the maintenance and licensing of the gaming facility building or structure. The Proposed Amendments in § 293.2 includes definitions of both *gaming facility* and *gaming spaces* to provide parties with clarity regarding the appropriate limits of State oversite under IGRA. Any compact provisions addressing the maintenance and licensing of a building or structure must be limited to the building or structure where the gaming activity occurs – the *gaming facility*. Further, if a compact or amendment mandate that the Tribe adopt standards equivalent or comparable to the standards set forth in a State law or regulation, the parties must show that these mandated Tribal standards are both directly related to and necessary for, the licensing and regulation of the gaming activity.

Proposed § 293.23 – May a compact or amendment include provisions that are directly related to the operation of gaming activities?

The Proposed Amendments contains a new § 293.23 clarifying a compact may include provisions that are directly related to the operation of gaming activities. Congress through IGRA at 25 U.S.C. 2710(d)(3)(C)(vii) provided that a compact may include provisions relating to any other subjects that are directly related to the operation of gaming activities. The Proposed Amendments in § 293.24 codify the Department's longstanding narrow interpretation of section 2710(d)(3)(C)(vi).

Proposed § 293.24 – What factors will be used to determine whether provisions in a compact or amendment are directly related to the operation of gaming activities?

The Proposed Amendments contains a new § 293.24 which codifies existing case law and the Department's longstanding narrow interpretation of section 2710(d)(3)(C)(vi) as requiring a "direct connection." The Department notes the Ninth Circuit in *Chicken Ranch* found the Department's longstanding direct connection test persuasive and consistent with the court's own independent analysis of IGRA and case law. The proposed § 293.24 provides compacting parties

with examples of provisions which have a direct connection to the Tribe's conduct of class III gaming activities as well as examples the Department has found do not satisfy the direct connection test.

Proposed § 293.25 – What factors will the Secretary analyze to determine if revenue sharing is lawful?

The Proposed Amendments contains a new § 293.25 which clarifies the appropriate scope of provisions addressing revenue sharing. Congress, through IGRA at 25 U.C.S. 2710 (d)(4), prohibited States from seeking to impose any tax, fee, charge, or other assessment upon an Indian Tribe or upon any other person or entity authorized by an Indian Tribe to engage in a class III activity. The Proposed Amendments codifies the Department's longstanding rebuttable presumption that any revenue sharing provisions are a prohibited tax, fee, charge, or other assessment. The Proposed Amendments also contains the Department's test to rebut that presumption.

Proposed § 293.26 – May a compact or extension include provisions that limit the duration of the compact?

The Proposed Amendments contains a new § 293.26 which addresses the appropriate duration of a compact. The Department and IGRA anticipate that compacts are long-term agreements between a Tribe and a State that reflect carefully negotiated compromises between sovereigns.

Proposed § 293.27 – May a compact permit a Tribe to engage in any form of class III gaming activity?

The Proposed Amendments contains a new § 293.27, which clarifies the appropriate scope of class III gaming that a State permits. Congress, through IGRA at 25 U.C.S. 2710(d)(1)(B), requires that a Tribe seeking to conduct class III gaming be located in a State that permits such gaming for any purpose by any person, organization, or entity.

The Department takes the position that the Second Circuit's decision in *Mashantucket Pequot Tribe v. Connecticut*, 913 F. 2d 1-24 (2d Cir. 1990) holding that Congress intended to codify the test set out in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) when it used the phrase "permits such gaming" such that IGRA refers to class III gaming categorically is correct. Under the Secretary's delegated authority to interpret and promulgate rules for IGRA, the Department finds that if a State allows any form of class III gaming, it is regulating all forms of class III gaming, which are a subject for good faith negotiations.

Proposed § 293.28 – May any other contract outside of a compact regulate Indian gaming?

The Proposed Amendments contains a new § 293.28 which clarifies that any agreement between a Tribe and a State or its political subdivisions which seeks to regulate a Tribe's right to conduct gaming – as limited by IGRA – is a gaming compact that must comply with IGRA and be submitted for review and approval by the Secretary.

Proposed § 293.29 – May a compact or amendment include provisions addressing Statewide remote wagering or internet gaming?

The Proposed Amendments contains a new § 293.29, which clarifies a compact may include provisions allocating jurisdiction to address Statewide remote wagering or internet gaming. The IGRA provides that a Tribe and State may negotiate for "the application of the criminal and civil laws and regulations of the Indian Tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity" and "the allocation of criminal and civil jurisdiction between the State and the Indian Tribe necessary for the enforcement of such laws and regulations." 25 U.S.C. 2710(d)(3)(c)(i)-(ii). The Department's position is that the negotiation between a Tribe and State over Statewide remote wagering or i-gaming falls under these broad categories of criminal and civil jurisdiction. Accordingly, provided that a player is not physically located on another Tribe's Indian lands, a Tribe should have the opportunity to engage in this type of gaming pursuant to a Tribal-State gaming compact. The Department notes the ultimate legality of gaming activity outside Indian lands remains a question

of State law, notwithstanding that a compact discusses the activity. However, Congress in enacting IGRA did not contemplate the Department would address or resolved complex issues of State law during the 45-day review period.[13] Further, non-IGRA Federal law may also place restrictions on that activity.

Proposed § 293.30 – What effect does this part have on pending requests, final agency decisions already issued, and future requests?

The Proposed Amendments contains a new § 293.30 which clarifies the proposed regulations are prospective and the effective date of the proposed regulations.

Proposed § 293.31 – How does the Paperwork Reduction Act affect this part?

The Proposed Amendments renumbers existing § 293.16 as § 293.31 to improve overall organization of the regulations.

VI. PROCEDURAL REQUIREMENTS

A. Regulatory Planning and Review (E.O. 12866)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant. Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public

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[13] *See, e.g.*, *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556 (10th Cir. 1997).

participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this proposed rule would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.). This proposed rule would codify longstanding Departmental policies and interpretation of case law in the form of substantive regulations which would provide certainty and clarity on how the Secretary will review certain provisions in a compact.

C. Congressional Review Act (CRA)

This rule is not a major rule under 5 U.S.C. 804(2). This rule:

- Does not have an annual effect on the economy of $100 million or more.
- Will not cause a major increase in costs or prices for consumers, individual industries, federal, State, or local government agencies, or geographic regions.
- Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act of 1995

This rule would not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than $100 million per year. The rule would not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq*.) is not required).

E. Takings (E.O. 12630)

This rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630 because this rulemaking, if adopted, does not affect

individual property rights protected by the Fifth Amendment or involve a compensable "taking." A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required because, the Department seeks to codify longstanding Departmental policies and interpretation of case law in the form of substantive regulations which would provide certainty and clarity on how the Secretary will review certain provisions in a compact.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. This rule:

- Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation with Indian Tribes (E.O. 13175)

The Department will conduct two virtual session, one in-person consultation, and will accept oral and written comments. The consultations sessions will be open to Tribal leadership and representatives of federally recognized Indian Tribes and Alaska Native Corporations.

- *In-Person Session:* The in-person consultation will be held on January 13, 2023, from 1 p.m. to 4 p.m. MST, at the BLM National Training Center (NTC), 9828 N. 31st Ave, Phoenix, AZ 85051.
- *1st Virtual Session:* The first virtual consultation session will be held on January 19, 2023, from 1 p.m. to 4 p.m. EST. Please visit https://www.zoomgov.com/meeting/register/vJIsd-2qrjwiH2bVXpLvS2VPUZESt2HgtKk to register in advance.

- *2nd Virtual Session:* The second virtual consultation will be held on January 30, 2023, from 2 p.m. to 5 p.m. EST. Please visit https://www.zoomgov.com/meeting/register/vJIsduGtqzgtE1hw9EIFrDf3-X_1gy5wGR0 to register in advance.
- *Comment Deadline:* Please see **DATES** and **ADDRESSES** sections for submission instructions.

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in E.O. 13175 and have hosted extensive consultation with federally recognized Indian Tribes in preparation of this proposed rule, including through a Dear Tribal Leader letter delivered to every Federally-recognized Tribe in the country, and through three consultation sessions held on May 9, 13, and 23, 2022.

I. Paperwork Reduction Act

OMB Control No. 1076-0172 currently authorizes the collection of information related to Class III Tribal-State Gaming Compact Process, with an expiration of August 31, 2024. This rule requires no change to that approved information collection under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq*.

J. National Environmental Policy Act (NEPA)

This rule would not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because this is an administrative and procedural regulation. (For further information see 43 CFR 46.210(i)). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

L. Clarity of this Regulation

We are required by Executive Orders 12866 (section 1 (b)(12)), 12988 (section 3(b)(l)(B)), and 13563 (section l(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use common, everyday words and clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

M. Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment - including your personal identifying information - may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects 25 CFR part 293

Administrative practice and procedure, Gambling, Indians-tribal government, State and local governments.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, proposes to revise 25 CFR part 293 to read as follows:

PART 293—CLASS III TRIBAL-STATE GAMING COMPACT

Subpart A – General Provisions and Scope

Sec.

Subpart B – Submission of Tribal-State Gaming Compacts

Subpart C – Secretarial Review of Tribal-State Gaming Compacts

Subpart D – Scope of Tribal-State Gaming Compacts

Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9, 2710.

Subpart A – General Provisions and Scope

§ 293.1 What is the purpose of this part?

This part contains:

(a) Procedures that Indian Tribes and/or States must use when submitting Tribal-State compacts and compact amendments to the Department of the Interior (Department); and

(b) Procedures and criteria that the Secretary of the Interior (Secretary) will use for reviewing such Tribal-State compacts or compact amendments.

§ 293.2 How are key terms defined in this part?

This part relies on but does not restate all defined terms set forth in the definitional section of IGRA.

(a) *Amendment* means:

(1) A change to a class III Tribal-State gaming compact other than an extension, or

(2) A change to secretarial procedures prescribed under 25 U.S.C. 2710(d)(7)(B)(vii) when such change is agreed upon by the Tribe and State.

(b) *Compact* or *Tribal-State Gaming Compact* means an intergovernmental agreement executed between Tribal and State governments under IGRA that establishes between the parties the terms and conditions for the operation and regulation of the Tribe's Class III gaming activities.

(c) *Extension* means an intergovernmental agreement executed between Tribal and State governments under IGRA to change the duration of a compact or amendment.

(d) *Gaming activity* or *gaming activities* means the conduct of class III gaming involving the three required elements of chance, consideration, and prize or reward.

(e) *Gaming facility* means the physical building or structure, where the gaming activity occurs.

(f) *Gaming spaces* means the areas within a gaming facility (as defined in paragraph (e) of this section) that are directly related to and necessary for the conduct of class III gaming such as: the casino floor; vault; count room; surveillance, management, and information technology areas; class III gaming device and supplies storage areas; and other secured areas. where the operation or management of class III gaming takes place, including the casino floor, vault, count, surveillance, management, information technology, class III gaming device, and supplies storage areas.

(g) *IGRA* means the Indian Gaming Regulatory Act of 1988 (Pub. L. 100-497) 102 Stat. 2467 dated October 17, 1988, (Codified at 25 U.S.C. 2701-2721 (1988)) and any amendments.

(h) *Meaningful concession* means:

(1) Something of value to the Tribe;

(2) Directly related to gaming;

(3) Something that carries out the purposes of IGRA; and

(4) Not a subject over which a State is otherwise obligated to negotiate under IGRA.

(i) *Substantial economic benefit* means:

(1) A beneficial impact to the Tribe;

(2) Resulting from a meaningful concession;

(3) Made with a Tribe's economic circumstances in mind;

(4) Spans the life of the compact; and

(5) Demonstrated by an economic / market analysis or similar documentation submitted by the Tribe or the State.

(j) *Tribe* means Indian Tribe as defined in 25 U.S.C. 2703(5).

§ 293.3 What authority does the Secretary have to approve or disapprove compacts and amendments?

The Secretary has the authority to approve a compact or amendment "entered into" by a Tribe and a State. See § 293.15 for the Secretary's authority to disapprove compacts or amendments.

§ 293.4 Are compacts and amendments subject to review and approval?

(a) Yes. All compacts and amendments, regardless of whether they are substantive or technical, must be submitted for review and approval by the Secretary.

(b) If an ancillary agreement or document:

(1) Changes a term to a compact, then it must be submitted for review and approval by the Secretary

(2) Implements or clarifies a provision contained in a compact or an amendment and is not inconsistent with an approved compact or amendment, it does not constitute a compact or an amendment and need not be submitted for review and approval by the Secretary.

(3) If an approved compact or amendment expressly contemplates an ancillary agreement or document, such as internal controls or a memorandum of agreement between the Tribal and State regulators, then such agreement or document is not subject to review and approval so long as it is not inconsistent with the approved compact or amendment.

(4) If an ancillary agreement or document interprets language in a compact or an amendment concerning the payment of a Tribe's gaming revenue or includes any of the topics identified in 25 CFR 292.24, then it may constitute an amendment subject to review and approval by the Secretary.

(c) If a Tribe or a State (including its political subdivisions) are concerned that their agreement or other document, including, but not limited to, any dispute resolution agreement, arbitration award, settlement agreement, or other resolution of a dispute outside of Federal court,

may be considered a "compact" or "amendment," either party may request in writing a determination from the Department if their agreement is a compact or amendment and therefore must be approved and a notice published in the *Federal Register* prior to the agreement becoming effective. The Department will issue a letter within 60 days providing notice of the Secretary's determination.

§ 293.5 Are extensions to compacts or amendments subject to review and approval?

No. Approval of an extension to a compact or amendment is not required if the extension does not include any changes to any of the other terms of the compact or amendment. However, the parties must submit the documents required by § 293.8(a) through (c). The extension becomes effective only upon publication in the *Federal Register*.

Subpart B – Submission of Tribal-State Gaming Compacts

§ 293.6 Who can submit a compact or amendment?

Either party (Tribe or State) to a compact or amendment can submit the compact or amendment to the Secretary for review and approval.

§ 293.7 When should the Tribe or State submit a compact or amendment for review and approval?

The Tribe or State should submit the compact or amendment after it has been duly executed by the Tribe and the State in accordance with applicable Tribal and State law, or is otherwise binding on the parties.

§ 293.8 What documents must be submitted with a compact or amendment?

Documentation submitted with a compact or amendment must include:

(a) At least one original compact or amendment executed by both the Tribe and the State;

(b) A Tribal resolution or other document, including the date and place of adoption and the result of any vote taken, that certifies that the Tribe has approved the compact or amendment in accordance with applicable Tribal law;

(c) Certification from the Governor or other representative of the State that they are authorized under State law to enter into the compact or amendment;

(d) Any agreement between a Tribe and a State, its agencies or its political subdivisions required by a compact or amendment if the agreement requires the Tribe to make payments to the State, its agencies, or its political subdivisions, or it restricts or regulates a Tribe's use and enjoyment of its Indian Lands and any other ancillary agreements, documents, ordinances, or laws required by the compact or amendment which the Tribe determines is relevant to the Secretary's review; and

(e) Any other documentation requested by the Secretary that is necessary to determine whether to approve or disapprove the compact or amendment. If a compact includes revenue sharing, a market analysis or similar documentation as required by § 293.24.

§ 293.9 Where should a compact or amendment or other requests under this part be submitted for review and approval?

Submit compacts, amendments, and all other requests under 25 CFR part 293 to the Director, Office of Indian Gaming, U.S. Department of the Interior, 1849 C Street NW, Mail Stop 3543, Main Interior Building, Washington, DC 20240. If this address changes, a document with the new address will be sent for publication in the *Federal Register* within 5 business days. Compacts and amendments may also be submitted electronically to *IndianGaming@bia.gov* as long as the original copy is submitted to the address listed in this section.

Subpart C – Secretarial Review of Tribal-State Gaming Compacts

§ 293.10 How long will the Secretary take to review a compact or amendment?

(a) The Secretary must approve or disapprove a compact or amendment within 45 calendar days after receiving the compact or amendment.

(b) The Secretary will notify the Tribe and the State in writing of the decision to approve or disapprove a compact or amendment.

§ 293.11 When will the 45-day timeline begin?

The 45-day timeline will begin when a compact or amendment is received, and date stamped by the Office of Indian Gaming. The Department will provide an email acknowledgement to the Tribe and the State of receipt including the 45th day for electronically submitted compacts or amendments.

§ 293.12 What happens if the Secretary does not act on the compact or amendment within the 45-day review period?

If the Secretary does not take action to approve or disapprove a compact or amendment within the 45-day review period, the compact or amendment is approved by operation of law, but only to the extent the compact or amendment is consistent with the provisions of IGRA. The Secretary will issue a letter informing the parties that the compact or amendment has been approved by operation of law after the 45th day and before the 90th day. The Secretary's letter may include guidance to the parties identifying certain provisions that are inconsistent with the Department's interpretation of IGRA. The compact or amendment that is approved by operation of law becomes effective only upon publication in the *Federal Register*.

§ 293.13 Who can withdraw a compact or amendment after it has been received by the Secretary?

To withdraw a compact or amendment after it has been received by the Secretary, the Tribe and the State must both submit a written request to the Director, Office of Indian Gaming at the address listed in § 293.9.

§ 293.14 When does a compact or amendment take effect?

(a) A compact or amendment, that is affirmatively approved or approved by operation of law takes effect on the date that notice of its approval is published in the *Federal Register*.

(b) The notice of affirmative approval or approval by operation of law must be published in the *Federal Register* within 90 days from the date the compact or amendment is received by the Office of Indian Gaming.

§ 293.15 Is the Secretary required to disapprove a compact or amendment that violates IGRA?

No. The IGRA provides the Secretary with time limited authority to review a compact or amendment and discretionary disapproval authority. If the Secretary does not take action to approve or disapprove a compact or amendment within 45 days, IGRA provides it shall be considered to have been approved by the Secretary, but only to the extent the compact or amendment is consistent with IGRA.

§ 293.16 When may the Secretary disapprove a compact or amendment?

The Secretary may disapprove a compact or amendment only if:

(a) It violates:

(1) Any provision of IGRA;

(2) Any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands;

(3) The trust obligations of the United States to Indians; or

(b) If the documents required in §293.8 are not submitted and the Department has informed the parties in writing of the missing documents.

Subpart D – Scope of Tribal-State Gaming Compacts

§ 293.17 May a compact or amendment include provisions addressing the application of the Tribe's or the State's criminal and civil laws and regulations?

Yes. A compact or amendment may include provisions addressing the application of the criminal and civil laws and regulations of the Tribe or the State that are directly related to, and necessary for, the licensing and regulation of the gaming activity. At the request of the Secretary pursuant to § 293.8(e), the parties must show that these laws and regulations are both directly related to and necessary for, the licensing and regulation of the gaming activity.

§ 293.18 May a compact or amendment include provisions addressing the allocation of criminal and civil jurisdiction between the State and the Tribe?

Yes. A compact or amendment may include provisions allocating criminal and civil jurisdiction between the State and the Tribe necessary for the enforcement of the laws and regulations described in § 293.17.

§ 293.19 May a compact or amendment include provisions addressing the State's costs for regulating gaming activities?

Yes. If the compact or amendment includes a negotiated allocation of jurisdiction to the State for the regulation of the gaming activity, the compact or amendment may include provisions to defray the State's actual and reasonable costs for regulating the specific Tribe's gaming activity. If the compact does not include requirements for the State to show actual and reasonable annual expenses for regulating the specific Tribe's gaming activity over the life of the compact is considered evidence of a violation of IGRA.

§ 293.20 May a compact or amendment include provisions addressing the Tribe's taxation of gaming?

Yes. A compact or amendment may include provisions addressing the Tribe's taxation of the tribally licensed gaming activity in amounts comparable to the State's taxation of State licensed gaming activities. A compact may not include provisions addressing the Tribe's taxation of other activities that may occur within or near the Tribe's gaming facility. The inclusion of provisions addressing the Tribe's taxation of other activities is considered evidence of a violation of IGRA.

§ 293.21 May a compact or amendment include provisions addressing the resolution of disputes for breach of the compact?

Yes. A compact or amendment may include provisions addressing how the parties will resolve a breach of the compact or other disputes arising from the compact including mutual limited waivers of sovereign immunity. If a Tribe is concerned that an agreement or other document, including but not limited to any dispute resolution, settlement agreement, or arbitration decision, constitutes a compact or amendment, or if the Tribe is concerned that the

agreement or other document interprets the Tribe's compact or amendment to govern matters that are not directly related to the operation of gaming activities, the Tribe may submit the document to the Department as set forth in § 293.4. The inclusion of provisions addressing dispute resolution in a manner that seeks to avoid the Secretary's review is considered evidence of a violation of IGRA.

§ 293.22 May a compact or amendment include provisions addressing standards for the operation of gaming activity and maintenance of the gaming facility?

Yes. A compact or amendment may include provisions addressing the Tribe's standards for the operation of the gaming activity as well as the Tribe's standards for the maintenance of the gaming facility, including licensing. If a compact or amendment mandate that the Tribe adopt standards equivalent or comparable to the standards set forth in a State law or regulation, the parties must show that these mandated Tribal standards are both directly related to and necessary for, the licensing and regulation of the gaming activity.

§ 293.23 May a compact or amendment include provisions that are directly related to the operation of gaming activities?

Yes. A compact or amendment may include provisions that are directly related to the operation of gaming activities.

§ 293.24 What factors will be used to determine whether provisions in a compact or amendment are directly related to the operation of gaming activities?

(a) The parties must show that these provisions described in § 293.23 are directly connected to Tribe's conduct of class III gaming activities. Examples include, but are not limited to:

(1) Minimum age for patrons to participate in gaming;

(2) Transportation of gaming devices and equipment; or

(3) Exclusion of Patrons.

(b) Mutually beneficial proximity, or even co-management alone is insufficient to establish a "direct connection" between the Tribe's class III gaming and adjacent business or amenities. Additionally, Tribal infrastructure projects or economic development activities that are funded by gaming revenue and may service or otherwise provide a benefit to the gaming activity are not directly related to the conduct of gaming without other evidence of a direct connection.

(c) Provisions which are not directly related to the operation of gaming activities include, but are not limited to:

(1) Limiting third party Tribes' rights to conduct gaming;

(2) Treaty rights;

(3) Tobacco sales;

(4) Compliance with or adoption of State environmental regulation of projects or activities that are not directly related to the Tribe's operation of gaming activities and maintenance of the gaming facility;

(5) Requiring memorandum of understanding, intergovernmental agreements, or similar agreements with local governments;

(6) Enforcement of State court orders garnishing employee wages or patron winnings;

(7) Granting State court jurisdiction over tort claims arising from the Tribe's conduct of class III gaming activities;

(8) Non-gaming Tribal economic activities including activities in or adjacent to the gaming facility, including but not limited to, restaurants, nightclubs, hotels, event centers, water parks, gas stations, and convenience stores; or

(9) Tribal class I or class II gaming activities.

(d) The inclusion of provisions which the parties cannot show a direct connection to the Tribe's conduct of class III gaming activities is considered evidence of a violation of IGRA.

§ 293.25 What factors will the Secretary analyze to determine if revenue sharing is lawful?

(a) A compact or amendment may include provisions that address revenue sharing in exchange for a State's meaningful concessions resulting in a substantial economic benefit for the Tribe.

(b) The Department reviews revenue sharing provisions with great scrutiny. We begin with the presumption that a Tribe's payment to a State or local government for anything beyond § 293.19 regulatory fees are a prohibited "tax, fee, charge, or other assessment." In order for the Department to approve revenue sharing the parties must show through documentation, such as a market study or other similar evidence, that:

(1) The Tribe has requested, and the State has offered specific meaningful concessions the State was otherwise not required to negotiate;

(2) The value of the specific meaningful concessions offered by the State provides substantial economic benefits to the Tribe in a manner justifying the revenue sharing required by the compact; and

(3) The Tribe is the primary beneficiary of the gaming, measured by projected revenue to the Tribe against projected revenue shared with the State;

(c) The inclusion of revenue sharing provisions to the State that is not justified by meaningful concessions of substantial economic benefit to the Tribe is considered evidence of a violation of IGRA.

§ 293.26 May a compact or extension include provisions that limit the duration of the compact?

Yes. However, IGRA anticipates compacts are long-term agreements between a Tribe and a State. These agreements reflect carefully negotiated compromises between sovereigns. A refusal to negotiate a long-term compact, or a short-term extension of at least one year to allow for negotiations to continue, is considered evidence of a violation of IGRA.

§ 293.27 May a compact or amendment permit a Tribe to engage in any form of class III gaming activity?

Yes. If the State allows any form of class III gaming, then the State is regulating all forms of class III gaming. A State's refusal to negotiate in a compact over all forms of class III gaming, not prohibited in the State, is considered evidence of a violation of IGRA.

§ 293.28 May any other contract outside of a compact regulate Indian gaming?

No. Any contract or other agreement between a Tribe and a State or its political subdivisions which seeks to regulate a Tribe's right to conduct gaming – as limited by IGRA – is a gaming compact that must comply with IGRA and be submitted for review and approval by the Secretary. A Tribe may submit any agreement between the Tribe and the State or its political subdivisions, mandated or required by a compact or amendment, which includes provisions for the payment from a Tribe's gaming revenue or restricts or regulates a Tribe's use and enjoyment of its Indian Lands, including a Tribe's conduct of gaming, for a determination if the agreement is a compact or amendment under § 293.4(c).

§ 293.29 May a compact or amendment include provisions addressing Statewide remote wagering or internet gaming?

Yes. A compact or amendment consistent with § 293.17 may include provisions addressing Statewide remote wagering or internet gaming that is directly related to the operation of gaming activity on Indian lands. A compact may specifically include provisions allocating State and Tribal jurisdiction over remote wagering or internet gaming originating outside Indian lands where:

(a) State law and/or the compact or amendment deem the gaming to take place, for the purposes of State and Tribal law, on the Tribe's Indian lands where the server accepting the wagers is located;

(b) The Tribe regulates the gaming; and

(c) The player initiating the wager is not located on another Tribe's Indian lands.

§ 293.30 What effect does this part have on pending requests, final agency decisions already issued, and future requests?

(a) Compacts and amendments pending on [EFFECTIVE DATE OF FINAL RULE], will continue to be processed under 25 CFR part 293, promulgated on December 5, 2008, and revised June 4, 2020, unless the applicant requests in writing to proceed under this part. Upon receipt of such a request, the Secretary shall process the pending compact or amendment under this part.

(b) This part does not alter final agency decisions made pursuant to this part before [EFFECTIVE DATE OF FINAL RULE].

(c) All compacts and amendments submitted after [EFFECTIVE DATE OF FINAL RULE] will be processed under this part.

§ 293.31 How does the Paperwork Reduction Act affect this part?

The information collection requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), and assigned control number 1076-0172. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Bryan Newland,

Assistant Secretary – Indian Affairs.

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